

FEDERAL REGULATION OF COLLECTIVE BARGAINING BY STATE AND LOCAL EMPLOYEES: CONSTITUTIONAL ALTERNATIVES

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I. INTRODUCTION

The recent decision of the Supreme Court in the *National League of Cities* case has profound implications for the relationship between the federal government and state and local governments. While it will dramatically alter the federal/state relationship in several respects, the new standard of "state sovereignty" relied upon in the decision means that it will be a long time before we can determine its full implications with certainty.¹

Though many now assume in view of *National League of Cities v. Usery*² that a federal bargaining law regulating state and local employees is doomed, others are more cautious and suggest that "doom is too hard a word because the mind of the legislator can be very creative."³ Whether the holding in that case precludes federal regulation is the subject of this article. Various constitutional bases for future legislation are explored and analyzed with the understanding that the judiciary has shown a propensity for permitting by one legal avenue what is denied by another. As will be discussed, though the front door for legislation under the commerce clause may be closed or partially closed, the back door remains wide open under the spending power of article I, section 8, clause 1 and the fourteenth amendment, to accomplish perhaps indirectly what cannot be done directly. Therein lies the dilemma for those seeking federal legislation regulating state and local employees; assuming *arguendo* that the political judgment of Congress would favor such legislation, what would be a constitutionally permissible means to implement it following the *National League of Cities* case?

Federal intervention into state and local labor relations has

1. Statement of Undersecretary of Labor Michael Moskow addressing the U.S. Conference of Mayors in Milwaukee, Wisconsin, June 30, 1976, [1976] GOV'T EMPL. REL. REP. (BNA) 664: B-15.

2. 426 U.S. 833 (1976). The holding in *National League of Cities* is discussed in the text accompanying notes 12-14 & 129-40 *infra*.

3. Statement of Solicitor of Labor William J. Kilberg, [1976] GOV'T EMPL. REL. REP. (BNA) 668: B-6. The fires of legislative creativity will most likely be kindled by the determination of unions to pass bargaining legislation notwithstanding the Supreme Court ruling. For example, John Ryor, President of the National Education Association [hereinafter referred to as NEA] promised at a recent convention that the National League of Cities should prepare for battle because the decision will cause the NEA to redouble its efforts in Congress once a legislative way to avoid the Court's decision is found. *Id.* 664 at B-11.

been a subject of debate for years.⁴ Arguments deal with whether or not the public employer is significantly different from the private employer so as to require different treatment under an amendment to the National Labor Relations Act⁵ [hereinafter referred to as NLRA] or under other alternatives such as the establishment of minimum standards or separate legislation. Additionally, opponents of such federal legislation argue that there is a lack of significant experience at the state and local government levels in public sector labor relations. Therefore, in view of the diverse and complex legislative, fiscal, and political structures of the states, federal legislation is premature.⁶ A final area of disagreement centers on whether it is appropriate under our federalist system to devise and impose national uniform legislation on the sovereign states or, instead, to permit the choice of engaging in public sector collective bargaining to be made by each state as a part of its sovereign right.

Strong and persuasive arguments can be made on both sides of the issues. However, the fact remains that, as of this date, only thirty-seven states have chosen to pass some kind of public sector bargaining legislation covering some but not all of their employees.⁷ Many of these laws are noncomprehensive and were passed in direct response to the special urging of interest groups.⁸ Interestingly, public employees in states without legislation and public employees excluded from legislative coverage are not necessarily without collective bargaining. In many states, the judiciary has generously provided the authority for legally enforceable agreements reached under de facto, extra-legal bargaining arrangements on the basis of implied authority.⁹

4. See Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. TOL. L. REV. 681 (1974).

5. McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479 (1976).

6. *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 281 (1972) (statement by former Secretary of Labor James D. Hodgson) [hereinafter cited as 1972 *Hearings*].

7. See Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C.L. REV. 235 (1977) and Pegnetter & Hayford, *State Employee Grievances and Due Process: An Analysis of Contract Arbitration and Civil Service Review Systems*, 29 S.C.L. REV. 305 (1977).

8. See generally McCann & Smiley, note 5 *supra*, at 495-506.

9. Compare *Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975) with *Commonwealth v. County Bd. of Arlington*, 217 Va. 558, 232 S.E.2d 30 (1977).

Paralleling this increased recognition of bargaining rights for public employees through legislative or judicial means has been the tremendous growth in the number of public employees and their membership in unions.¹⁰ These taken together have given the issue of public sector collective bargaining for state and local employees a national dimension prompting congressional hearings on federal legislation.¹¹ The controversy continued with labor and management groups preparing for battle in Congress until the *National League of Cities* case,¹² testing the applicability of the Federal Fair Labor Standards Act¹³ [hereinafter referred to as FLSA] to state employees, went to the Supreme Court. At that time, because of the case's relevance to a federal bargaining law, management and labor groups withdrew their lobbying efforts pending its outcome. The Court, in *National League of Cities*, held the application of the FLSA to the states to be unconstitutional, stating: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."¹⁴

Following this case, efforts on behalf of federal legislation to regulate collective bargaining by state and local government employees have proceeded somewhat cautiously. Although even proponents of the legislation had taken the position that this case terminated chances for passage of a federal bargaining law,¹⁵ new appraisals of the case suggest that there may yet be constitutional means available for federal regulation of the labor relations of state and local governments.¹⁶ Assuming *arguendo* that the political judgment is made to propose federal bargaining legislation, the question of its constitutionality arises. This article in Part II will assess federal programs presently regulating the states and, in Part III, will discuss the constitutionality of such programs in the context of there being a permissible avenue for a federal

10. As of October 1976, the full-time equivalent employment of all state and local governments was over 10 million persons. [1977] GOV'T EMPL. REL. REP. (BNA) RF-145 at 71:2116. Almost 30% of these employees are covered by union agreements, and over 2.6 million belong to unions. 1972 *Hearings*, note 6 *supra*, at 71.

11. See 1972 *Hearings*, note 6 *supra*.

12. 426 U.S. 833 (1976).

13. 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975).

14. 426 U.S. at 852.

15. See note 159 and accompanying text *infra*.

16. See note 160 and accompanying text *infra*.

collective bargaining statute. Part IV will discuss and suggest the method for federal control of state and local government labor relations most likely to withstand constitutional scrutiny.

II. FEDERAL PROGRAMS AND REGULATION OF STATES: EXISTING AVENUES FOR FEDERAL INTERVENTION

Although serious questions are raised in *National League of Cities v. Usery*¹⁷ as to the extent to which the federal government under the commerce clause may regulate the states under a federal bargaining law, an even more intriguing question remains as to whether the federal government would be similarly restrained when basing its regulation on its spending power or on the fourteenth amendment. The Court in *National League of Cities* expressly refrained from resolving whether federal regulations it ruled unconstitutional would be sanctioned under the spending power or the fourteenth amendment stating: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment."¹⁸

In view of the unresolved nature of the issue, a brief description of some of the existing federal programs regulating the states is presented, since these programs may provide avenues for federal regulation of the states' collective bargaining policies or serve as models for such federal regulation.

A. *Spending Power: Federal Contracts and Grants*

It is clear that federal grants and procurement contracts have significant financial impact on state and local governments. In 1968, almost 55 billion dollars were expended on federal government procurement contracts¹⁹ and, in 1975, 52 billion dollars in grants were expected to be distributed to state and local governments (up from 2.2 billion dollars in 1950).²⁰ Although the federal government at one time contracted mostly for housekeeping

17. 426 U.S. 833 (1976).

18. *Id.* at 852 n.17.

19. See Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171 (1971).

20. Boasberg & Feldesman, *The Washington Beat: Federal Law and Administration—Recent Developments*, 7 URB. LAW. 556 (1975).

needs, it has now assumed a major acquisitioning power; its federal contract and grant interests have expanded beyond the usual sphere of goods and services to include research, planning, and technological development.²¹ Coupled with this growth are increasing costs of running state and local governments and declining state and local revenues. Both these phenomena have provided the opportunity for federal grant programs such as revenue sharing to appear and to receive support from state and local government officials. These factors, combined with increasing financial support of the state and local programs through the use of federal contracts and grants, create the potential for unprecedented federal control through the power of the purse.²²

Guiding state and local use of federal funds is, of course, the traditional means for seeking compliance with federal policy objectives. In addition to using the money for agreed purposes, other conditions or requirements now can include recordkeeping, bookkeeping information, eliminating duplicative federal/state program management, labor standards and avoiding discriminatory use of the funds. As will be discussed in Part III, the courts generally uphold such federally imposed conditions. Legal questions as to the permissibility of these conditions arise only when the federal policy sought to be imposed extends beyond the confines of the particular contract or grant to tangentially related matters.

Though the Court has stated that the tenth amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,"²³ this proposition will be reconsidered in light of the *National League of Cities* case. In undertaking this analysis it is necessary first to examine the existing federal regulation of programs administered by state and local governments.

At times, the distinction between federal procurement contracts and federal grants is blurred, if not elusive, though the touchstone of their difference seems to be the nature for which they were entered into. A suggested definitional distinction pro-

21. Grossbaum, note 19 *supra*, at 174.

22. For example, studies show that while local government expenditures rose 840% between 1946 and 1970, the corresponding growth in tax revenues was 692%. See Agnew, *The Case for Revenue Sharing*, 60 GEO. L.J. 7, 31 (1971).

23. *United States v. Darby*, 312 U.S. 100, 124 (1941).

vides: "Contracts in the nature of grants differ from procurement contracts in that they are not vehicles for the procurement of facilities, goods and services for the needs of administering the federal government, but are vehicles for the purpose of providing federal assistance to carry out a particular statutory program."²⁴

Since it might be possible to tie in a federal bargaining guideline to either federal contracts or grants, both of which are authorized under article I, section 8, clause 1 of the Constitution,²⁵ a brief consideration of conditions imposed under such programs is provided.

1. *Procurement Contracts.* — The federal government in deciding with whom to contract generally looks for a competent supplier who agrees to meet the contractual requirements for the lowest price. The federal contractor may be an individual, private corporation, or state or local governing body. The power of the federal government to set conditions is largely unrestricted. The Supreme Court has stated: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions of its contracts."²⁶ Varied conditions are routinely imposed and uniformly sustained upon judicial review. Limitations do exist, however, when for example the federal requirements are excessive, discriminatorily enforced, or so vague as to be unenforceable.²⁷ However, the federal government can further nonprocurement objectives by merely attaching such conditions to the contracts — these are often called national goals clauses, a typical illustration being a nondiscrimination clause.²⁸

Conditions and statutory directives range from national goals clauses to labor standards requirements for preferred recipi-

24. Conway, *The Federal Grant: An Administrative View*, 30 *FED. B.J.* 119, 121 (1971).

25. U.S. CONST. art. I, § 8, cl. 1 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

26. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

27. See Part III *infra*; see generally O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 *CAL. L. REV.* 443 (1966); Note, *Unconstitutional Conditions*, 73 *HARV. L. REV.* 1595, 1600 (1960).

28. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 *WIS. L. REV.* 301.

ents of federal contracts.²⁹ Illustrations of federally imposed standards relating to wages, hours, and working conditions include the Walsh-Healey Act,³⁰ which requires government supply contractors to pay their employees a minimum prevailing wage rate for the locality as determined by the Secretary of Labor, and the Davis-Bacon Act,³¹ applying the same requirements on federally funded construction projects.

Under federal spending power, pursuant to federal procurement contracts, the government has considerable latitude in structuring its contractual relations with state and local governments; this extends to conditioning a contract award on the state or local government's compliance with federal labor policy.³² However, it is also clear that federal procurement contracts may not be best suited for implementing a comprehensive federal collective bargaining policy for state and local employment relations since the receipt of government contracts tends to be sporadic and on fragmented subject matters.³³ This conclusion is reinforced by the fact that the federal government prefers the grant route rather than the contract procedure in carrying out most of its educational, health, social welfare, housing, environmental, and transportation programs.³⁴

2. *Grants.* — Federal grants may be divided into two types, block and categorical, each having distinct characteristics.³⁵ Categorical grants are awarded for specific projects approved by the

29. Illustrations of categories that have been preferred in awarding government contracts include blind industries (41 U.S.C. §§ 46-48 (1970)); small enterprises (70A Stat. 127 (1956); 69 Stat. 580 (1955)); depressed market areas (32 C.F.R. §§ 7.104-.120 (1960)). See also Buy America Act, 41 U.S.C. §§ 10(a)-10(d) (1970).

30. 41 U.S.C. §§ 35-45 (1970).

31. 40 U.S.C. §§ 276(a) to 276(a)(5) (1970). See also Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29 LAW & CONTEMP. PROB. 488 (1964).

32. 40 U.S.C. §§ 276(a)-276(a)(5) (1970).

33. However, it should be noted that some amount of comprehensiveness could be achieved. For example, if a governing body receives any federal contracts, in excess of a specified sum, an entire agency of that governmental body is subject to the contractual conditions and not just the employees receiving the benefits. An illustration is a university which by accepting federal contracts agrees to affirmative action in its personnel policies as to all employees on campus. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-70), as amended by Exec. Order No. 11,478, 3 C.F.R. 803 (1966-70), reprinted in 42 U.S.C. § 2000e (Supp. V 1975). These obligations are further implemented by federal regulations. 41 C.F.R. ch. 60 (1976).

34. See Boasberg & Feldesman, note 20 *supra*, at 559.

35. See generally Pinsky & Kurzman, *Preface to National Institute on Federal Urban Grants: Policies and Procedures*, 22 AD. L. REV. 113 (1970).

federal government whereas block grants are used to disburse substantial amounts of money to state and local governments.³⁶ Fewer restrictions are attached to block grants to permit the state and local governments flexibility in implementing federal goals. Under block grants the aggregate available federal money is apportioned on a formula basis among the states and their political subdivisions once the appropriate plans and filing requirements have been submitted to the administering federal agency.³⁷

(a) *Categorical grants.* — Federal funds provided to states and localities under categorical grants are for specified projects, and the federal government typically maintains strict controls to ensure not only that the funds are used efficiently, but also that the beneficiaries of the program are protected.³⁸ Conditions and restrictions imposed on the use of the funds include statutory provisions both specific to the project and generally applicable to federal funding contracts and projects, as well as statutes involving constitutional standards applicable to those imbued with sufficient state action. Examples are antidiscrimination provisions,³⁹ the Hatch Act,⁴⁰ which conditions federal monies to states and localities on their agreement that certain public officials refrain from political activity, and the Highway Beautification Act of 1965,⁴¹ which requires the states to institute programs for effective control and maintenance of outdoor advertising. Obviously such federal regulation can substantially influence state and local government conduct of business, and enforcement machinery stands ready to find violations and order compliance. For example, a state in violation of the Hatch Act provision could be ordered to discharge the guilty employee upon threat of reduced federal funding in an amount twice the amount of the offender's annual salary.⁴² In the case of the Highway Beautification Act, a noncomplying state could lose ten percent of its federal highway funds.⁴³

36. *Id.*

37. Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600 (1972).

38. Willcox, *The Function & Nature of Grants in National Institute on Federal Urban Grants: Policies and Procedures*, 22 AD. L. REV. 131 (1970).

39. 23 U.S.C. § 140(a) (1970).

40. *See Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Palmer v. United States Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir. 1962).

41. 23 U.S.C. § 131(b) (1970), *enforced*, *Vermont v. Brinegar*, 379 F. Supp. 606 (D. Vt. 1974).

42. *Ohio v. United States Civil Serv. Comm'n*, 65 F. Supp. 776 (S.D. Ohio 1946).

43. 23 U.S.C. § 131(b) (1970), *enforced*, *Vermont v. Brinegar*, 379 F. Supp. 606 (D. Vt. 1974).

Clearly, the federal government has great latitude in regulating the state and local governments' abilities to receive and administer federally funded projects and in subjecting them to far-reaching conditions including labor standards.

(b) *Block grants.* — As mentioned above, vast amounts of federal funds are expended under the block grant program. In 1975, the program funded over 500 domestic projects and involved an expenditure of 52 billion dollars, most of which was spent under the revenue sharing program.⁴⁴ In its first year of operation, 1972, revenue sharing accounted for over thirty-six percent of the total funding for federal grants. Over a five-year period, the program disbursed 30.2 billion dollars to 38,000 governing bodies.⁴⁵

Even though block grants have the least restrictive federal controls, conditions imposed on state and local government recipients of the funds do exist. For example, in the past under the revenue sharing law, conditions have included: (1) limitation of spending to statutorily prescribed priority expenditures⁴⁶ and (2) prohibition on using the funds to acquire matching federal funds.⁴⁷ Current conditions include prohibition on discriminating on the basis of race, color, national origin, or sex in any program funded in whole or in part by the federal funds.⁴⁸ A more significant condition, however, is found in the miscellaneous conditions where, in addition to accounting and reporting requirements,

44. Two-thirds of the designated monies is to go to the local governments, and the remaining one-third is to be distributed to the state governments. State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221-1264 (Supp. V 1975). See Sklar, *Impact of Revenue Sharing on Minorities and the Poor*, 10 HARV. C.R.-C.L.L. REV. 93, 94 (1975).

45. See Sklar, note 44 *supra*, at 98.

46. These included (1) ordinary and necessary maintenance and operating expenses for (A) public safety (including law enforcement, fire protection, and building code enforcement), (B) environmental protection (including sewage disposal, sanitation, and pollution abatement), (C) public transportation (including transit systems and streets and roads), (D) health, (E) recreation, (F) libraries, (G) social services for the poor or aged, and (H) financial administration; and (2) ordinary and necessary capital expenditures authorized by law. 31 U.S.C. § 1222(a)(1-2) (Supp. V 1975). This section was repealed by Act Oct. 13, 1976, Pub. L. No. 94-488, § 3 (a), 90 Stat. 2341.

47. 31 U.S.C. § 1223(a) (Supp. V 1975). This section was repealed by Act Oct. 13, 1976, Pub. L. No. 94-488, § 4(a), 90 Stat. 2341.

48. *Id.* § 1242(a) (Supp. V 1975) as amended by Pub. L. No. 94-488, § 8, 90 Stat. 2350. Failure to comply with this provision may be referred to the Attorney General, who may bring an action pursuant to Title VI of the Civil Rights Act of 1964 for appropriate orders including injunctive relief. 31 U.S.C. § 1242(g) as amended by Pub. L. No. 94-488, § 8a, 90 Stat. 2350. Courts have afforded relief under § 1242. *Cf.* United States v. City of Chicago, 395 F. Supp. 329 (N.D. Ill. 1975) (an action by individual plaintiffs for injunctive and declaratory relief).

*wage requirements for public employees are mandated.*⁴⁹ Laborers and mechanics employed on projects funded twenty-five percent or more with federal monies must be paid prevailing wages in accordance with the Davis-Bacon Act.⁵⁰ Additionally, public employees working in programs or activities in whole or in part funded by revenue sharing funds must be paid wages not less than those paid to persons in similar public positions with the same employer if twenty-five percent of all such employees in the state or local government are paid from the revenue sharing funds.⁵¹ Obviously, the ability of the federal government to regulate state and local government personnel matters through the use of block grants is becoming less problematical and more evident in practice.

In addition to labor relations matters, other state and local government interests and responsibilities, such as law enforcement programs, are becoming enmeshed with federal funding and regulation. The Omnibus Crime Control and Safe Streets Act of 1968⁵² created the Law Enforcement Assistance Administration [hereinafter referred to as LEAA] as a means of encouraging state and local development of comprehensive law enforcement programs. The first year's appropriation in 1969 of 63 million dollars increased to 850 million dollars for fiscal year 1973;⁵³ again, this illustrates that federal involvement, if not also regulation, is on the increase in programs involving the vital interests of state and local governments. The courts' traditional predisposition in balancing these federal/state interests in the area of block grants has been to uphold the right of federal regulation through the use of the federal purse;⁵⁴ with respect to regulating

49. 31 U.S.C. §§ 1243(a)(1)-(8) (Supp. V 1975) *as amended by* Pub. L. No. 94-488, §§ 3(b), 9, 12, 90 Stat. 2341, 2354, 2357.

50. *Id.* § 1243(a)(6).

51. *Id.* § 1243(a)(7). Failure to comply with these miscellaneous provisions, after the exhaustion of 60 days notice for corrective action, will result in suspension of funds for the remainder of the entitlement period and future entitlement periods, until the Secretary is satisfied that full and proper corrective action has occurred. *Id.* § 1243(b) (Supp. V 1975). In *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), \$76 million in federal monies was withheld because of noncompliance with revenue sharing conditions.

52. 84 Stat. 1880 (codified in scattered sections of 5, 18, & 42 U.S.C. (1970)). See generally Rector & Wolfe, *The Law Enforcement Assistance Administration in Perspective*, 5 COLUM. HUMAN RIGHTS L. REV. 55 (1973).

53. Rector & Wolfe, note 52 *supra*, at 65 n.46.

54. In upholding the right of the federal government to withhold federal funds from state and local governments violating the Hatch Act, the Supreme Court said that although "[t]he United States is not concerned with and has no power to regulate political

LEAA money, one court has held recently that the federal government can insert conditions on block grants which are not even statutorily enumerated in the enabling legislation.⁵⁵ Whether there is continuing vitality to the ostensibly limitless ability of the federal government to regulate indirectly the state and local governments through such means, in view of the thrust of *National League of Cities*, will be discussed in Part III below.

(c) *Federal minimum bargaining standards in public urban transit systems.* — Publicly owned urban transit systems' labor relations policies have been indirectly regulated by the federal government since 1964 through the Urban Mass Transportation Act of 1964⁵⁶ [hereinafter referred to as UMTA], which provides federal aid to public systems formerly privately owned and operated. Most urban mass transit systems were privately owned in the 1960's but by the mid-1970's, so many had become publicly owned that eighty-four percent of the employees worked for such public employers.⁵⁷ In an attempt to protect the collective bargaining rights that the employees had in the private sector under the NLRA,⁵⁸ union groups successfully had included in the federal funding law a mandatory provision that workers and their unions would lose no bargaining rights resulting from public takeovers financed by federal funds. Section 13(c) of the UMTA, setting the requirements for receipt of federal funds, provides:

It shall be a condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for . . . (2) the continuation of collective bargaining rights⁵⁹

activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947).

55. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

56. 49 U.S.C. §§ 1601-1613 (1970 & Supp. V 1975). See generally Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168 (1976).

57. AMERICAN PUBLIC TRANSIT ASS'N, 1974-75 TRANSIT FACT BOOK II (1975). Additionally, these employers carried 90% of the revenue passengers. *Id.*

58. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970). It has been estimated that 95% of all transit properties were unionized under the NLRA. Barnum, note 56 *supra*, at 170.

59. 49 U.S.C. § 1609(c) (1970).

Thus it can be seen that, though the law does not specify precise requirements to which the public employer must adhere, it does require bestowal of bargaining rights even in states without bargaining statutes and federal approval of any such procedures agreed to by the parties.⁶⁰ In the absence of statutory authorization to bargain or to strike, the resulting unavailability of the federal funding arrangement has prompted some states to pass permissive bargaining legislation,⁶¹ though strike prohibitions are usually retained and supplemented with binding arbitration provisions resolving any and all labor disputes.⁶² The federal funding arrangement under the UMTA thus provides a working model for federal regulation of the labor relations of public employees through the imposition of federal minimum bargaining standards tied to federal funding.

(d) *Federal/state cooperative programs: unemployment compensation model.* — The constitutional provision which authorizes the spending power discussed above as well as the taxing power⁶³ has also been the basis for federal regulations concerning state unemployment problems, an area certainly of vital interest to state governments. Pursuant to this power, Congress established a federal/state program of unemployment insurance under the Social Security Act,⁶⁴ presently covering over eighty-five percent of wage and salary workers.⁶⁵ Designed to provide temporary wage loss compensation to employees as protection against the

60. Between 1964 and 1975, the Secretary of Labor considered more than 800 cases and denied only three grant applications because of the parties' failure to meet the minimum standards. Barnum, note 56 *supra*, at 171.

61. See, e.g., VA. CODE § 15.1-1357.2 (Cum. Supp. 1977).

62. Virginia's statute reads, "The employees of any transit facility . . . shall have the right, in the case of any labor dispute relating to the terms and conditions of their employment for the purpose of resolving such dispute, to submit the dispute to final and binding arbitration by an impartial umpire or board of arbitrators acceptable to the parties." VA. CODE § 15.1-1357.2 (Cum. Supp. 1977). For a discussion of the legality of such statutes, see Note, *Binding Interest Arbitration in the Public Sector: Is It Constitutional?*, 18 WM. & MARY L. REV. 787 (1977). The issue of whether a public employer can be compelled by an arbitrator to fund its contractual arrangements is discussed in Mulcahy, *The Ability to Pay: The Public Employee Dilemma*, 31 ARB. J. 90 (1976).

63. U.S. CONST. art. I, § 8, cl. 1.

64. Federal Unemployment Tax Act, I.R.C. §§ 3301-3311, 26 U.S.C. §§ 3301-3311 (1970 & Supp. V 1975), and Social Security Act, 42 U.S.C. §§ 301-1397 (1970 & Supp. V 1975). See also *Staff Data and Materials on Unemployment Compensation Amendments of 1976* (H.R. 10210), Committee on Finance, United States Senate (Wash. 1976) [hereinafter referred to as *Staff Data H.R. 10210*].

65. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1976, Table 465 p. 297.

economic hazards of unemployment, the insurance program establishes a fund from payroll taxes from which to pay benefits.⁶⁶

The federal provisions in the Social Security Act and the Federal Employment Tax Act⁶⁷ establish the basic framework of the system, and certain minimum federal requirements must be met by the states before the employers can qualify for the benefits.⁶⁸ If a state passes a law which meets these requirements, employers subject to the 3.2 percent federal payroll tax receive a 2.7 percent credit against such tax.⁶⁹ Further, the state is entitled to federal grants to cover all of the necessary costs of administering the program.⁷⁰ Until 1976, exceptions existed for state and local government employment; however, amendments have been added recently to include these employees beginning January 1, 1978, notwithstanding the potential constitutional question regarding the federal government's authority to regulate state labor relations after *National League of Cities*.⁷¹ On that issue, the Solicitor of Labor takes the position that it is within the power of Congress to impose such federal requirements subject to certain conditions, one such condition being that state unemployment compensation laws cover state and local government employees.⁷² Though this type of federal regulation involving federal/state cooperation with conditioned grants has been upheld by the courts,⁷³ it remains to be seen whether article I, section 8, clause 1 of the Constitution continues to provide the authority for Congress to regulate state and local employment relations under

66. See, e.g., *Fahs v. Tree-Gold Co-op Growers*, 166 F.2d 40 (5th Cir. 1948).

67. I.R.C. §§ 3301-3311, 26 U.S.C. §§ 3301-3311 (1970 & Supp. V 1975).

68. Though there are many requirements, one which pertains to labor relations matters states that compensation cannot be denied to anyone who refuses to accept work because the job is vacant as the direct result of a labor dispute, or because the wages, hours, or conditions of work are substandard, or if as a condition of employment, the individual would have to join a company union or resign from or refrain from joining a labor union. 26 U.S.C. § 3304(a)(5) (1970).

69. 26 U.S.C. §§ 3301, 3302(b) (1970 & Supp. V 1975).

70. 42 U.S.C. §§ 501-504 (1970 & Supp. V 1975).

71. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2667 (1976), codified in scattered sections of 5, 26, and 42 U.S.C.A. (West Supp. 1977).

72. "It is also within the power of Congress to grant funds to the States to assist them in the administration and funding . . . , to place limitations on those grants and to make it a condition of such grants [to be approved by federal authorities]." Staff Data H.R. 10210, note 65 *supra*, at Appendix A, 97.

73. See notes 38-42 and accompanying text *supra*.

such an arrangement, a question specifically reserved in *National League of Cities v. Usery*⁷⁴ and one which will be discussed below.

B. Fourteenth Amendment

In 1964, the Supreme Court upheld the constitutionality of title II of the Civil Rights Act of 1964 regulating public accommodations.⁷⁵ The legislative history showed that the fundamental objective of title II was "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" and was based on the authority of section 5 of the equal protection clause of the fourteenth amendment as well as Congress' power "to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution."⁷⁶ In deciding the case, the Court noted that ample power for the legislation existed under the commerce clause and, therefore, it need not consider the other ground.⁷⁷ The Court added: "That is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone."⁷⁸

In a concurring opinion, Justice Douglas argued that the fourteenth amendment would be the more appropriate way of dealing with the problem of racial discrimination and thereby would provide broad federal power eliminating the need for the interstate commerce nexus.⁷⁹ Justice Goldberg, in a concurring opinion, added that "Congress clearly had authority under both § 5 of the fourteenth amendment and the commerce clause to enact the Civil Rights Act of 1964."⁸⁰ However constitutionally permissible, there have been voices raised questioning the propriety of a decision based on the fourteenth amendment. For example, one observer noted: "[A] decision based on the fourteenth amendment would have tremendous momentum of principle with potential disruptive consequences for state-federal relationships and implications for judicial power and duty for transcending the immediate controversy—in fact, far beyond issues

74. 426 U.S. 833, 852 n.17 (1976).

75. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

76. *Id.* at 249-50.

77. *Id.* at 250.

78. *Id.*

79. *Id.* at 280 (Douglas, J., concurring).

80. *Id.* at 293 (Goldberg, J., concurring). See generally Note, *The Civil Rights Act of 1964—Source and Scope of Congressional Power*, 60 Nw. U.L. Rev. 574 (1965).

of racial discrimination or public accommodation."⁸¹

Both the public and the private sectors have been subject to legislative command under the fourteenth amendment, and federal regulation of state and local governments' personnel policies continues to grow. For example, in 1972 Congress extended coverage of the Equal Employment Opportunity Act⁸² to state and local government employers and set forth minimal standards under which a public employer must deal with its employees.⁸³ The Supreme Court upheld this extension in *Fitzpatrick v. Bitzer*.⁸⁴ The added coverage was based on congressional authority under section 5 of the fourteenth amendment.⁸⁵ The Court explained this authority as being a very broad power: "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."⁸⁶

Since *Fitzpatrick*, other federal laws regulating state labor policies have been upheld, based at least partially on the fourteenth amendment, including the Equal Pay Act of 1963⁸⁷ and the Age Discrimination in Employment Act of 1967⁸⁸ as will be discussed below. Thus, if a case can be made that federal collective bargaining legislation is necessary to secure equal protection under the fourteenth amendment, then the developing law suggests section five of the fourteenth amendment might provide a vehicle for federal intervention.⁸⁹

81. Mishkin, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 130 (1965).

82. 5 U.S.C. §§ 5108, 5314-5316, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975).

83. *Id.*

84. 427 U.S. 45 (1976).

85. *Id.* at 453 n.9.

86. *Id.* at 456. The Court added by footnote that "[a]part from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment." *Id.* at n.11.

87. Equal Pay Act of 1963, 29 U.S.C. § 206 (1970).

88. 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).

89. The road to finding violations of equal protection may be difficult, as illustrated in Justice Stevens' concurring opinion, where he stated that even in *Fitzpatrick* he did not believe a violation had been shown. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (Stevens, J., concurring).

This issue and the issue of whether the *National League of Cities* case makes inroads on *Fitzpatrick* will be discussed under section III.

C. Commerce Clause

The most obvious possible legal basis for federal regulation of labor relations matters is found in the commerce clause of the Constitution, which authorizes Congress to legislate over activities in interstate commerce or, by judicial interpretation, those activities affecting interstate commerce.⁹⁰ To meet the traditional constitutional standards, a federal collective bargaining law would need first to have a sufficient effect on interstate commerce to be a proper subject of federal legislation and, second, to have a rational basis for its regulatory scheme.⁹¹

The effect on interstate commerce of the activities of state and local governments is substantial and easy to observe. For example, in 1970 the interstate purchases made for these governments amounted to an estimated 121 billion dollars, or ninety-two percent of total state and local government expenditures. This figure represented 12.4 percent of the gross national product and involved over three million private employees.⁹² In 1971, purchases amounted to 135 billion dollars of which fifty-seven percent was for compensating nearly 9.7 million employees. Employment generated by state and local government purchase of goods and supplies for these activities accounted for an additional 3.7 million jobs, making a total of nearly 13.4 million jobs, a figure which is more than sixteen percent of the nation's total civilian employment.⁹³ Likewise, public employee strikes have repeatedly occurred; in 1973, 386 work stoppages by state and local government employees resulted in a loss of 2,299,300 man-days of work,⁹⁴ not an inconsequential effect on interstate commerce.

90. U.S. CONST. art. I, § 8, cl. 3 provides: (Congress shall have Power) "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

91. For a general discussion of this subject matter prior to *National League of Cities*, see Brown, *Constitutional Basis and Implications of Federal Collective Bargaining Legislation for State and Local Employees*, 1 OKLA. CITY L. REV. 125, 133 (1976).

92. *Hearing on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcomm. on Education and Labor*, 92d Cong., 2d Sess. 34 (1972) (statement of Jerry Wurf).

93. 119 CONG. REC. S.24817-820 14,057 (daily ed. July 19, 1973). For a summary of the effect on commerce of spending and employment by state and local government, see S. REP. NO. 690, 93d Cong., 2d Sess. at 24 (1974).

94. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 434, *WORK STOPPAGES IN GOVERNMENT 3* (1973). For discussion of the consequences of strikes on strikers and the community, see Thiebolt & Corwin, *Welfare and Strikes, The Use of Public Funds To Support Strikers*, LABOR RELATIONS AND PUBLIC POLICY SERIES, Report No. 6 (Wharton School of Fin. & Comm. (1972)).

With fewer than forty states having bargaining laws, many of which cover only relatively few categories of employees,⁹⁵ it is perhaps pertinent to note that the NLRA has as one of its justifications: "The denial by some employers of the right to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"⁹⁶

The second constitutional requisite under the commerce clause for a federal bargaining law—having a rational basis for the regulatory scheme—also appears present. Just as the basic purpose of the NLRA is to minimize industrial strife and provide for equality of bargaining power between employees and employer,⁹⁷ so also in the public sector are the same goals relevant and necessary in view of the often piecemeal, noncomprehensive approach to governmental labor relations employed by most state and local governments.⁹⁸ It has been axiomatic that when the states fail to meet a perceived public need, the federal government may move in to fill that need. Such a default by the states has, in other areas of social and economic legislation, provided a rational basis for and has led to federal regulation of unemployment insurance, occupational safety and health, civil rights, and private sector labor relations.⁹⁹ It is predictable that a rational basis would be present for federal bargaining legislation covering state and local employees.

The national authority for such legislation under the commerce clause would not have been doubted until recently. Chief Justice Marshall in 1824 described the clause as providing the

95. See McCann & Smiley, note 5 *supra*, at 495-514; Brown, note 4 *supra*, at 695-711.

96. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970).

97. *Id.* In upholding the constitutional rationality of the NLRA, the Supreme Court stated:

[S]toppage of those operations by industrial strife would have a most serious effect upon interstate commerce Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937).

98. See Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57 (1973).

99. An illustration of federal intervention due to state inaction in unemployment compensation is found in Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 185 (1955).

plenary power to regulate and held that "[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, orher [sic] than are prescribed in the Constitution."¹⁰⁰ Supreme Court opinions since that time have steadfastly fulfilled that definition and have consistently held that federal regulation of labor relations matters is a proper congressional power under the commerce clause.¹⁰¹

The extension and application of the above rationale to the public sector was clearly accomplished in 1968 in *Maryland v. Wirtz*,¹⁰² when the Supreme Court upheld extension of the Fair Labor Standards Act¹⁰³ to cover public employees of state owned hospitals and schools. The Court stated: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."¹⁰⁴ This decision apparently laid to rest arguments that there were any limitations on Congress' power to regulate the labor relations of state and local governments. Arguments that the very essence of federalism, i.e., that the balance of power between federal and state governments permitting continued diversity and experimentation by the states was being destroyed by giving the federal government a predominant role, were again stilled by the Court as had been the judicial practice for years¹⁰⁵ in setting aside claims of interference with state sovereignty.¹⁰⁶ However, opponents of federal intervention persisted and continued to maintain that the tenth amendment to the Constitution prohibited federal regulation and thereby reserved such decisions to the states or the people,¹⁰⁷ even though the law had developed to the point where

100. *Gibbons v. Ogden*, 22 U.S. 1, 86, 9 Wheat. 1, 196 (1824).

101. See generally P.R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE*, 1937-1970 (1970).

102. 392 U.S. 183 (1968).

103. 29 U.S.C. §§ 201-219 (1970).

104. *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968).

105. This was usually done on the basis stated long ago by Justice Johnson in *Gibbons v. Ogden*: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints." 22 U.S. 1, 101, 9 Wheat. 1, 230 (Johnson, J., concurring).

106. E.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968).

107. U.S. CONST. amend. X. The concept of dual federalism wherein state powers limit the national power though displaced by traditional judicial construction has been summarized as follows:

the tenth amendment had been characterized as a "truism," merely stating that "all is retained which had not been surrendered."¹⁰⁸

However, in 1975 the Supreme Court in *Fry v. United States*,¹⁰⁹ while upholding federal regulation of state employees' wages, made inroads in that precedent by cautioning that the tenth amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."¹¹⁰ The ultimate rehabilitation of the tenth amendment *vis à vis* state and local governments came in 1976 in a case testing the constitutionality of extending federal fair labor standards to those governments. In *National League of Cities v. Usery*,¹¹¹ a five-four decision, the Supreme Court overruled 150 years of legal precedent and attempted to realign the federal/state relationship by placing a limit on the federal government's ability to regulate states through a restriction on the commerce power based on the tenth amendment: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."¹¹² Whether this holding forecloses use of the commerce power as a basis for federal bargaining legislation will be discussed below.

Another argument for possible limitation of federal regulation under the commerce power has been the eleventh amend-

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- (1) The national government is one of enumerated powers only; (2) Also, the purposes which it may constitutionally promote are few; (3) Within their respective spheres the two centers of government are "sovereign", and hence "equal"; (4) The relation of the two centers with each other is one of tension rather than collaboration.

Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

108. *United States v. Darby*, 312 U.S. 100, 124 (1941).

109. 421 U.S. 542 (1975).

110. *Id.* at 547 n.7.

111. 426 U.S. 833 (1976). For general discussion, see Note, *State Governmental Immunity From Federal Regulation Based on the Commerce Clause* — National League of Cities v. Usery, 26 DE PAUL L. REV. 101 (1976).

112. 426 U.S. at 852. For discussion of general implications of this case on federalism, see Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

ment of the Constitution,¹¹³ which provides nonconsenting states immunity from suit by private citizens in federal court. Obviously, such a limitation would hamper enforcement of collective bargaining rights under federal regulation by limiting forums for enforcement. However, the Supreme Court has recently upheld the constitutional power of Congress under the commerce clause to legislate in the area of labor standards as applied to public employers, notwithstanding the eleventh amendment.¹¹⁴ The Court ruled that in view of the plenary power of Congress over commerce, congressional intent to lift the immunity provided by the eleventh amendment, although not to be implied, may be accomplished by express provisions, presumably within the new limits prescribed by the *National League of Cities* case.¹¹⁵ The relevancy of the eleventh amendment problem as it relates to available remedies under a federal bargaining law may be minimal as most states have consented in employment contracts to sue and be sued, and most contract claims are brought in state court.¹¹⁶

An interesting, yet distinct, parallel development involving judicial interpretation of the eleventh amendment as it affects federal regulation of the states arose in *Fitzpatrick v. Bitzer*.¹¹⁷ There the Supreme Court upheld the Federal Civil Rights Act as applied to state governments, rejecting the argument that the

113. "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. For discussion, see C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); Comment, *The Elusive Eleventh Amendment and the Perimeters of Federal Power*, 46 U. COLO. L. REV. 211 (1974).

114. *Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279 (1973).

115. Justice Brennan added, in dissent, that Congress can "readily repair the deficiency . . . simply by amending the Act expressly to declare that a State that engages in an enterprise covered by the 1966 amendments shall be amenable to suit . . . in federal court." *Id.* at 308-09 (Brennan, J., dissenting). That proposition of course now must be reviewed within the context of *National League of Cities*.

116. However, drafting of federal legislation would need to provide proper forums for suit and remedies, especially in view of potential federal preemption problems. For an overview of possible implications, see Chanin & Snyder, *The Bugaboo of Federal Preemption: An Analysis of the Relationship Between a Federal Collective Bargaining Statute for Employees of State and Local Governments and State Statutes Affecting Such Employees*, 3 FLA. ST. U.L. REV. 236 (1975); Lieberman, *Memorandum Analysis of Preemption Problems With Proposed Federal Bargaining Legislation for State/Local Employees*, [1975] GOV'T EMP. REL. REP. (BNA) 593: E-1 at E-2; Brown, note 91 *supra*, at 148-51.

117. 427 U.S. 445 (1976).

eleventh amendment and the principle of state sovereignty barred suits by citizens against their state employers.¹¹⁸ However, this federal legislation was based on section 5 of the fourteenth amendment, which the Court found a necessary limitation on the "Eleventh Amendment, and the principle of state sovereignty it embodies."¹¹⁹ The Court added that this federal authority is plenary and appropriate under section 5 of the fourteenth amendment and "Congress may, in determining what is 'appropriate legislation' . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."¹²⁰

Thus, it can be seen that federal regulation of state and local government labor relations may be possible under different constitutional avenues. The ultimate legality of course depends on the Supreme Court's future interpretation of these various bases when placed in the context of the appropriate federal/state relationship as delineated in *National League of Cities*. That task is undertaken below. It should be noted at the outset that there is ample room for multiple interpretations, encouraged by the five-four decision in *National League of Cities*, with the fifth vote a concurring opinion based on an approach balancing the state and federal interests.

III. LEGALITY OF FEDERAL BARGAINING LEGISLATION: ANALYSIS OF POSSIBLE CONSTITUTIONAL BASES

Whether federal bargaining legislation for state and local employees will withstand constitutional scrutiny may well depend upon the legal basis advanced by its drafters. Recent history demonstrates federal powers have greatly expanded, often at the expense of the states' powers, and it is altogether possible that such an expansion will continue notwithstanding the *National League of Cities* rationale or, alternatively, that other constitutionally sound bases for the exercise of congressional authority will be found to support bargaining legislation. For example, as discussed in this article, recent legal interpretations make it appear possible to use the tax power for purposes having no relation to the raising of revenues, or to use federal funds to purchase compliance with regulations that could not be enacted as regula-

118. *Id.*

119. *Id.* at 456.

120. *Id.*

tory laws, or to enact federal laws under the fourteenth amendment, which in other contexts might be unconstitutional.

These observations merely restate the legal analytical framework established by recent Supreme Court holdings. In *National League of Cities*, the expansion of federal power to regulate the states under the commerce clause was slowed, if not halted, by emanations from the tenth amendment wherein federal regulation operated "to directly displace the States' freedom to structure integral operations in areas of traditional government functions."¹²¹ However, the Court specifically reserved judgment as to whether such regulation might be permissible under the spending power or the fourteenth amendment of the Constitution.¹²² In *Fitzpatrick v. Bitzer*,¹²³ decided during the same term as *National League of Cities*, the Court upheld the federal regulation of the states under the fourteenth amendment, stating that such power is "plenary within the terms of the constitutional grant" and which by its terms embodies "limitations on state authority."¹²⁴ Which, if any, constitutional bases would provide a permissible means for federal regulation of state and local labor relations, in light of these cases, is explored below.

A. Commerce Clause Power After National League of Cities

For over 150 years there had been a general expansion of federal power under the commerce clause of the Constitution. In *Maryland v. Wirtz*,¹²⁵ the Supreme Court upheld that expansion to the public sector by permitting extension of the FLSA¹²⁶ to employees of state hospitals, institutions, and schools. The Court stated: "If a State is engaging in economic activities that are validly regulated by the Federal government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."¹²⁷

However, in 1976 the Supreme Court in *National League of Cities*¹²⁸ expressly overruled *Maryland v. Wirtz* and jolted the heretofore easy expansion of federal power to an apparent stand-

121. 426 U.S. 833, 852 (1976).

122. *Id.* at n.17.

123. 427 U.S. 445 (1976).

124. *Id.* at 456.

125. 392 U.S. 183 (1968).

126. 29 U.S.C. §§ 201-219 (1970).

127. 392 U.S. at 197.

128. 426 U.S. 833 (1976).

still by holding that the federal authority under the commerce clause is limited by the "undoubted attribute of state sovereignty" secured by the tenth amendment.¹²⁹ The case involved a challenge to Congress' 1974 amendments to the FLSA, which extended coverage of federal minimum wage and overtime regulations to state and local government employees.¹³⁰ States and localities, chafing under burgeoning personnel costs, intricate reporting requirements, and curtailed public services, argued that this intrusion into internal state and local affairs exceeded congressional authority.¹³¹ The Supreme Court agreed, ruling the amendments invalid inasmuch as they impaired the states' integrity or "ability to function effectively in a federal system."¹³² The Court emphasized that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."¹³³

The majority opinion based its holding on a two-pronged test, determining that federal regulations are outside the scope of the commerce clause if their coverage extends to "functions essential to separate and independent existence" . . . so that Congress may not abrogate the States' otherwise plenary authority to make them"¹³⁴ and operates "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"¹³⁵ In seeking to define the states' "essential functions," the Court identified typical illustrations as including "fire prevention, police protection, sanitation, public health, and parks and recreation,"¹³⁶ and held that the FLSA

129. *Id.* at 845.

130. 29 U.S.C. §§ 203(s)(5), (x) (Supp. V 1975).

131. 426 U.S. 833 (1976).

132. *Id.* at 852 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)). The Court split five to four in *National League of Cities*, or, more correctly, four-one-four with Justice Blackmun concurring.

133. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

134. *Id.* (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)).

135. 426 U.S. at 852.

136. *Id.* at 851. The Court notes that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. The Court contrasted those examples with state activities not regarded as "integral parts of their governmental activities" such as when a state operates a railroad (citing *United States v. California*, 297 U.S. 175 (1936)). *Id.* at 854 n.18.

amendments would significantly alter or displace the states' abilities to structure employer—employee relationships in these areas.¹³⁷ The Court cited instances in the record in which higher wages required by the Act forced curtailment of, *inter alia*, police cadet training, affirmative action programs, work-study police programs, and internship classes as well as supplanting state policy choices in establishing employee wage scales and work schedules.¹³⁸ These factors, in the Court's judgment, touched an "undoubted attribute of state sovereignty . . . to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions"¹³⁹ and displaced the states' freedom to structure these integral operations. Inasmuch as the only discretion left to the states under the federal regulation was to raise taxes or cut services or payrolls to meet their mandated increased costs, these factors were unconstitutional.¹⁴⁰

Though this decision is the first to articulate explicitly any state sovereign limitation on the commerce power, it was foreshadowed by the Court's 1975 decision in *Fry v. United States*.¹⁴¹ In that case, the Federal Economic Stabilization Act of 1970,¹⁴² which imposed a temporary wage freeze for state and local government employees, was upheld under the commerce power, but the Court cautioned that Congress cannot "exercise [its] power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."¹⁴³ In upholding the statute, the *Fry* Court had essentially set aside the states' contracts with their labor unions and employees. The majority in *National League of Cities* evidently felt, however, that the statute in *Fry* was less intrusive on state choices as to how governmental opera-

137. 426 U.S. at 852.

138. *Id.* at 846.

139. *Id.* at 845.

140. Regulations on compensatory time off forced localities to restructure work schedules in a way the Court found to be "highly disruptive" and costly, imposing substantially higher personnel costs (estimated in California to be between \$8 million and \$16 million). *Id.* at 846.

141. 421 U.S. 542 (1975).

142. Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (Supp. V 1975).

143. *Fry v. United States*, 421 U.S. 542, 547 n.7. Justice Brennan, in dissent, takes issue with the majority's reliance on the quote from *Fry*:

The only import of the footnote in *Fry*, then, is that Congress may not invade state sovereignty by exercising powers not delegated to it by the Constitution; since the wage ceilings at issue in *Fry* were clearly within the commerce power, we found no "drastic invasion of state sovereignty."

426 U.S. at 861-62 n.4. (Brennan, J., dissenting).

tions should be structured than the FLSA, which affected what wages would be paid, what hours would be worked, and what compensation would be provided for overtime.¹⁴⁴ Both enactments operated to coerce states into establishing wage scales at federal direction, with one requiring a minimum wage and the other prohibiting wage increases in excess of seven percent.¹⁴⁵ Yet the majority in *National League of Cities* preserved the *Fry* rationale, noting that in *Fry* there was an

extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency.¹⁴⁶

An additional factor distinguishing *Fry* is that in the *National League of Cities* case there was no forced choice between additional financial burdens or alteration of state choices on structuring its operations. The financial impact of federal commerce legislation on state operations has long been considered a policy question, appropriately left for resolution by Congress operating within the political arena.¹⁴⁷ However, the Court in *National League of Cities* took special note of the "significant impact on the functioning of the governmental bodies involved"¹⁴⁸ by the potential increased costs of complying with the FLSA as that contributed to displacing a state's choices.

A most vigorous attack on the majority was written by Jus-

144. 426 U.S. 833 (1976).

145. In dissent, Justice Brennan noted that fact and stated, "[I]t is absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum." *Id.* at 872 (Brennan, J., dissenting).

146. *Id.* at 853.

147. The Court has stated that cost considerations relate not to constitutional issues, but rather to the "wisdom, need, and effectiveness of a particular project," and are therefore questions for Congress. *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941). *Cf. Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279 (1973) (where the Court held that the increased costs of FLSA amendments do not affect the validity of the commerce power even though "it may place new or even enormous fiscal burdens on the states." *Id.* at 284.).

148. 426 U.S. at 846.

tice Brennan, joined by Justices White and Marshall, who found no precedent for a tenth amendment limitation on the commerce power or other delegated powers.¹⁴⁹ Justice Brennan characterized the repudiation by the majority of 150 years of unbroken precedent in favor of a novel sovereignty doctrine as an ill-conceived abstraction with "profoundly pernicious consequences,"¹⁵⁰ which "can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree."¹⁵¹ Justice Brennan maintained that the majority result rendered a "catastrophic judicial body blow at Congress' power under the Commerce Clause . . . [with] an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision."¹⁵²

The deciding vote in the case was cast by Justice Blackmun in a concurring opinion, which was much less pervasive than that of the majority.¹⁵³ Justice Blackmun expressed concern with the majority's broad holding that Congress can never constitutionally regulate the activities of the states in the area of their essential functions.¹⁵⁴ Since Justice Blackmun will presumably have the deciding vote in future cases, it is important to examine how he perceives the limits on congressional power to regulate the states under the commerce power. Justice Blackmun admitted to being "not untroubled by certain possible implications of the Court's opinion," which he identified as a "balancing approach" and adopted as his own.¹⁵⁵ This approach in future cases, Justice Blackmun said, would "not outlaw federal power . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."¹⁵⁶

149. *Id.* at 860 (Brennan, J., dissenting).

150. *Id.* at 861-63.

151. *Id.* at 860.

152. *Id.* at 880. The other dissent was by Justice Stevens, who intimated the majority had merely substituted its policy judgment for that of Congress, found the "principle on which the holding rests . . . difficult to perceive," and said "[s]ince I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid." *Id.* at 880-81 (Stevens, J., dissenting).

153. *Id.* at 856 (Blackmun, J., concurring).

154. *Id.*

155. *Id.*

156. Recent support for this position is found in *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977). Justice Brennan in dissent argues that "[s]uch an approach,

The implications of *National League of Cities* as to the constitutionality of a federal collective bargaining law are open to debate. Professor Benjamin Aaron shortly after the decision predicted that the Federal Equal Pay Act of 1963¹⁵⁷ (an amendment of the FLSA) and Age Discrimination in Employment Act of 1967¹⁵⁸ [hereinafter referred to as ADEA] would be inapplicable to state and local government workers and said "prospects for a federal law establishing collective bargaining rights for employees of state and local governments appear to be virtually dead."¹⁵⁹ Others have taken a more cautious view, for example, contending that the decision, while perhaps not precluding such legislation, certainly puts into question the constitutionality of possible federal legislation dealing with collective bargaining by state and local employees.¹⁶⁰

The ultimate resolution of the constitutional issue must await passage of such a law, and a Supreme Court pronouncement on whether labor relations involves an essential function and whether such a regulation directly displaces state choices. An early return of lower court cases indicates, however, that *National League of Cities* will be narrowly construed. Despite Justice Brennan's ringing alarm that the case will have "profoundly pernicious consequences,"¹⁶¹ these early cases in upholding the Equal Pay Act¹⁶² and the ADEA suggest that there is room for interpretive extension of federal regulation over the state and local employment relationship.

A Utah federal district court recently had occasion to apply *National League of Cities* in a suit brought by employees under the ADEA against school board officials.¹⁶³ In denying a motion for summary judgment based on *National League of Cities*, the court held that though public education is an essential and inte-

however, is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress." 426 U.S. at 876 (Brennan, J., dissenting).

157. 29 U.S.C. § 206 (1970).

158. 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).

159. Address presented Aug. 9, 1976, at the annual meeting in Atlanta of the Section of Labor Relations Law, American Bar Association. BNA DLR No. 158, D-1 at D-2 (1976). Also for general discussion, see Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PA. L. REV. 665 (1977).

160. Statement by former Undersecretary of Labor Michael Moskow. BNA DLR No. 127, A-6, A-7 (1976).

161. *National League of Cities v. Usery*, 426 U.S. at 860 (Brennan, J., dissenting).

162. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1970).

163. *Usery v. Board of Educ.*, 421 F. Supp. 718 (D. Utah 1976).

gral state government function, the federal regulation does not unduly intrude upon or directly displace state choices.¹⁶⁴ In reaching its conclusion, the court used the balancing approach of the majority opinion as stressed by Justice Blackmun in his concurring opinion.¹⁶⁵ In assessing whether a federal regulation causes a "direct" displacement of the states' power, the court said that it "necessarily requires a balancing of the competing national and state interests."¹⁶⁶ In addition to finding an overriding national interest, the court found that the "ADEA only imposes a limited negative obligation on the state employer . . . rather than an affirmative obligation to totally restructure an integral state operation of the school board."¹⁶⁷ The court also found support for its holding under section 5 of the fourteenth amendment, which permits appropriate federal legislation to enforce the amendment,¹⁶⁸ a constitutional basis upheld after *National League of Cities* in *Fitzpatrick v. Bitzer*.¹⁶⁹

Other federal district courts have made similar rulings even though the Equal Pay Act is part of the FLSA, and both were expanded to cover state and local employees by the 1974 amendments to the Act and are based on the commerce clause.¹⁷⁰ In

164. *Id.* at 720.

165. The court stated: "The majority opinion in *National League of Cities* does not rigidly protect the states as separate and independent sovereignties in the exercise of their integral governmental functions. The Court's analysis . . . indicates that the Court will balance the respective interests of federal and state governments in regulating economic activity." *Id.* at 719.

166. *Id.* at 720. The court held that "Congress has a national interest in preventing arbitrary discrimination in employment on the basis of age . . . [which is] particularly significant when balanced against the defendant's nominal interest in arbitrarily discriminating" *Id.*

167. *Id.*

168. *Id.* at 721.

169. 427 U.S. 445 (1976). The Court ruled that the eleventh amendment of the Constitution does not bar the recovery of money damages by state employees who show that the state discriminated against them in violation of the Civil Rights Act. State sovereignty in other words is limited by section five of the fourteenth amendment. In the instant case, the Utah court stated that the fourteenth amendment is particularly applicable in the present case, where, if proven, the charges of age discrimination would constitute a denial of equal protection. *Usery v. Board of Educ.*, 421 F. Supp. 718 (D. Utah 1976).

170. *Usery v. Edward J. Meyer Memorial Hosp.*, 428 F. Supp. 1368 (W.D.N.Y. 1977); *Usery v. Eastern Ky. Univ.*, No. CA 76-15 (E.D. Ky., Jan. 21, 1977), [1977] Gov't EMPL. REL. REP. (BNA) 697: 13-14; *Brown v. County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977); *Aaron v. Davis*, 424 F. Supp. 1238 (E.D. Ark. 1976); *Brennan v. A & M Consolidated Independent School Dist.*, No. CA 74-H-1532 (S.D. Tex. Nov. 30, 1976); *Usery v. Dallas Independent School Dist.*, 421 F. Supp. 111 (N.D. Tex. 1976); *Usery v. Bettendorf Community School Dist.*, 423 F. Supp. 637 (S.D. Iowa 1976); *Usery v. Fort*

Usery v. Allegheny County Institution District,¹⁷¹ the question reached the United States Court of Appeals for the Third Circuit in an Equal Pay Act case, and the court narrowly construed *National League of Cities* to hold that the tenth amendment restriction on the federal government does not preclude enforcement of the federal regulation over the state's discriminatory personnel policy.¹⁷² Additionally, the court rejected the argument that since the Equal Pay Act was "housed" in the FLSA it must be "presumed to have been a commerce clause enactment," and instead found that authority for the federal regulation would exist under section 5 of the fourteenth amendment, even though the legislative history of that act "does not explicitly rely on the fourteenth amendment."¹⁷³

In seeking to evaluate the constitutionality of proposals for federal public sector bargaining legislation after *National League of Cities*, one must be mindful of the above guidelines, and the law must formulate the bargaining relationship in such a way as to avoid, if possible, impairing the states' abilities to function within the federal system. Further, if state and local labor relations are to be viewed as an essential function of the state, the bargaining obligations, if any, must not too deeply intrude on or displace a state's choice in these matters. In balancing the competing interests of the national and state governments, the drafting of any such bargaining law will obviously be difficult and such law must be drawn adroitly if not by divine inspiration. How that task might be accomplished is explored subsequently in the section dealing with the constitutionality of specific proposals under different constitutional bases.¹⁷⁴

B. Powers Under Article I, Section 8, Clause 5: Spending and Taxing for the General Welfare

Though the majority opinion in *National League of Cities* limited the commerce clause as a constitutional basis for federal

Madison Community School Dist., No. CA 75-62-1 (S.D. Iowa, Sept. 1, 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976); *Usery v. Charleston County School Dist.*, No. CA 76-248 (D.S.C., Aug. 24, 1976); *Usery v. Sioux City Community School Dist.*, No. CA 76-4024 (N.D. Iowa, Aug. 20, 1976); *Riley v. University of Lowell*, No. CA 76-1118-M (D. Mass., July 22, 1976). But see *Usery v. Ownesboro-Daviess County Hosp.*, 423 F. Supp. 843 (W.D. Ky. 1976), where the court used *National League of Cities* to interpret the FLSA definition of employer as excluding a state hospital from coverage.

171. 544 F.2d 148 (3d Cir. 1976).

172. *Id.* at 154-55.

173. *Id.*

regulation of state and local government labor relations, it did hold open the intriguing possibility that the ends sought to be accomplished by federal regulation, though unconstitutional on one basis, could be achieved under a different constitutional basis. As to whether a federal minimum wage or even a federal bargaining law could be constitutionally tied to a federal grant, the Court offered the following guidance: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment."¹⁷⁵

The second constitutional basis, section 5 of the fourteenth amendment (discussed below) was explicitly upheld subsequent to that opinion in *Fitzpatrick v. Bitzer*.¹⁷⁶ Here the Court found such power to be "plenary within the terms of the constitutional grant" and held that federal legislation regulating the states on that constitutional basis would not be an invasion of the states' sovereignty.¹⁷⁷

With respect to the constitutionality of conditioning federal regulations, *e.g.*, a bargaining law, on Congress' spending power, two areas must be examined: 1) The legitimacy of such an enactment and 2) the limitations, if any, of that power. Article I, section 8, clause 1 establishes the right of the federal government to raise revenues through taxes and to spend that money for the general welfare of the nation.¹⁷⁸ The issue at hand is whether Congress, in the exercise of its spending power, may condition disbursement upon compliance with federal requirements normally within the realm of state discretionary power.

The authority of the federal government to impose terms and conditions upon which its contracts and grants shall be disbursed has long been established. The Supreme Court has held: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions

174. See section IV *infra*.

175. *National League of Cities v. Usery*, 426 U.S. at 852 n.17. Justice Brennan, in dissent, also appears to accept the legitimacy of this statement. *Id.* at 880.

176. 427 U.S. 445 (1976).

177. *Id.* at 452-56.

178. U.S. CONST. art. I, § 8, cl. 1 is set out at note 25 *supra*.

upon which it will make needed purchases."¹⁷⁹ Furthermore, conditioning federal monies on the requirement of a state's passing enabling legislation, *e.g.*, for a federal/state unemployment compensation program, has been upheld by the Supreme Court and found not to violate tenth amendment notions of state sovereignty.¹⁸⁰ The concept has been dubbed "cooperative federalism" and often involves the use of federal funds to be matched by state funds for the common purpose laid down by federal law.¹⁸¹ If a state fails to comply adequately, the federal government may cut off funds and/or compel compliance with the conditions by use of an injunction.¹⁸²

In *Oklahoma v. United States Civil Service Commission*,¹⁸³ the Supreme Court sustained the Hatch Act,¹⁸⁴ which conditions federal monies on certain state employees' refraining from partisan political activities, stating:

While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.¹⁸⁵

It is, therefore, clear that Congress according to traditional Supreme Court analysis may validly attach conditions to its taxing and spending programs pursuant to its enumerated powers. However, there are limitations to this power in that the conditions must be reasonably related to the purposes of the spending

179. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). More recently, the Court in *Lau v. Nichols*, 414 U.S. 563 (1974), said that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed." *Id.* at 569. See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958).

180. *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

181. See J. BARRON & C. DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 242 (1975).

182. *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Townsend v. Swank*, 404 U.S. 282 (1971); *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

183. 330 U.S. 127 (1947).

184. 5 U.S.C. § 1502 (1970).

185. 330 U.S. at 143-44.

and taxing programs.¹⁸⁶ Justice Cardozo made that point in *Steward Machine Co. v. Davis*,¹⁸⁷ where he noted that the Court was not saying "that a tax is valid . . . if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power."¹⁸⁸

Another argued limitation, rejected by the Court, is that the contractual consent for federal funds obtained by the federal government from the state was exacted by undue influence or duress. In *Steward Machine Co.*, the Court, in upholding the unemployment compensation program over arguments by the state that, due to the state's poor position caused by the Great Depression, refusal to comply with the federal offer of money was impossible, observed:

Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation We cannot say that she [the state] was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will We think the choice must stand.¹⁸⁹

A final area of possible limitation on conditions under the spending power falls under the label of unconstitutional conditions. This limitation may occur when the government conditions the extension of a benefit or privilege to an individual recipient

186. See generally Comment, *The Federal Conditional Spending Power: A Search For Limits*, 70 NW. U.L. REV. 293 (1975) [hereinafter cited as *Northwestern Comment*]. A district court in *Romeo Pub. Schools v. HEW* recently held that federal funds cannot be cut off where federal regulations do not clearly prohibit the alleged noncompliance. [1977] GOV'T EMPL. REL. REP. (BNA) 706:10. A recent Fifth Circuit case, *Florida v. Mathews*, 526 F.2d 319 (5th Cir. 1976), provides an illustration of a court's assessment of reasonable relatedness.

187. 301 U.S. 548 (1937).

188. *Id.* at 590. The Court added that in determining national goals, the "Congress must have the benefit of a fair margin of discretion." *Id.* at 594.

189. *Id.* at 590.

upon his relinquishing or foregoing a constitutional right.¹⁹⁰ Because the law permitting federal conditions in the disbursement of federal monies is apparently well settled, relatively few recent cases exist which challenge that premise. However, one recent case, *Vermont v. Brinegar*,¹⁹¹ illustrates and summarizes an application of the above principles where federal aid for highway construction and beautification under the Federal Highway Beautification Act of 1965¹⁹² was conditioned on the states' instituting programs for effective control and maintenance of outdoor advertising. While states were given considerable freedom in devising such programs, the federal government required displaced sign owners to be compensated for removal of their advertising.¹⁹³ To induce compliance, the federal government agreed to pay seventy-five percent of the compensation with the states paying twenty-five percent. The federal statute also provided that ten percent of the state's highway funds be withheld in the event of noncompliance.¹⁹⁴ Such impoundment occurred, and the state challenged the federal right to condition funds in such a manner. The court upheld the federal government's right and noted: "[S]uch a conditioning of federal funds upon the accomplishment of certain requirements does not run afoul of the Constitution."¹⁹⁵ The court rejected the argument that the advertiser-reimbursement provision violated the tenth amendment and found that the federal government had a legitimate "national interest."¹⁹⁶

To summarize the federal constitutional guidelines on the authority of Congress to regulate under article I, section 8, clause 1, the court must find both that the regulation is reasonably related to a legitimate national goal and that the state's compliance, although induced, was not coerced. The first criterion is usually easily met, as a court normally applies the doctrine of presumed constitutionality when construing terms and condi-

190. See generally Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). See also Note, *Unconstitutional Conditions; Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966).

191. 379 F. Supp. 606 (D. Vt. 1974).

192. 23 U.S.C. §§ 131, 135-136, 319 (1970).

193. *Id.* § 131(g).

194. *Id.* § 131(b).

195. *Vermont v. Brinegar*, 379 F. Supp. 606, 617 (D. Vt. 1974).

196. *Id.* at 616. For support of this principle, see *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir. 1971).

tions enforced by the conditional spending power.¹⁹⁷ The second criterion, permitting persuasion but not coercion, has not been used extensively by the courts since the states have the option of refusing federal funds. Though the court in *Brinegar* stated that a federal regulation ceases to be voluntary when "economic catastrophe" threatened the state if a grant were refused,¹⁹⁸ the governing rule was expressed by the Supreme Court in *Oklahoma v. United States Civil Service Commission*¹⁹⁹ that if a state may adopt the "simple expedient" of not yielding to alleged federal coercion, then the courts will not find any violation of state sovereignty.²⁰⁰

It should also be noted that conditions promulgated after application by the states for federal funding under a categorical grant may be subsequently applied.²⁰¹ Additionally, a recent Fourth Circuit Court of Appeals case²⁰² held that federal standards not specifically enumerated in an enabling statute of a block grant may nevertheless be attached to the funds. In the Fourth Circuit case, the federal government had required state submission of an environmental impact statement necessitated by the National Environmental Policy Act²⁰³ before the construction of a state prison medical center funded by Law Enforcement Assistance Administration monies.²⁰⁴

The question of how the Supreme Court might assess a federal collective bargaining mandate tied to federal funding based on congressional authority from article I, section 8, clause 1 is open to debate. If one were to look only to judicial precedents, the prediction of constitutionality of a carefully drafted act would be simple enough; but if the Court were willing to overturn a century of precedent in *National League of Cities*, it might also be inclined to do the same in this instance.²⁰⁵ There are, however,

197. See *Northwestern Comment*, note 186 *supra*, at 305.

198. *Vermont v. Brinegar*, 379 F. Supp. 606, 617 (D. Vt. 1974).

199. 330 U.S. 127 (1947).

200. *Id.* at 143.

201. See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 970 (4th Cir. 1963).

202. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

203. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1970).

204. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

205. This issue by analogy may be resolved in the foreseeable future as the National Institute of Municipal Law Officers [hereinafter cited as the NIMLO] is preparing to litigate the recent amendments to the Unemployment Compensation Act to certain state and local employees which become effective January 1, 1978. Federal Unemployment

grounds for distinguishing the two types of cases, each dealing with a different constitutional base. Assuming *arguendo* that state labor relations is an essential function of state sovereignty, the second criterion of *National League of Cities*, namely, mandatory displacement of state choices, would arguably not be present since recipients of federal aid are not required to accept federal monies, but must voluntarily elect to do so. Therefore, assuming legislation could be drafted that would induce passage of a state bargaining bill, modeled after federal guidelines, as a condition for receiving federal aid and assuming such regulation is reasonably related to a legitimate national end embodied in the aid program, there would appear to be adequate grounds for the constitutionality of such legislation.²⁰⁶ The legality of such legislation of course depends on how it might be drafted, a subject discussed below.

Compensation Amendments of 1976, 26 U.S.C.A. § 3304 (West Supp. 1977). *County of Los Angeles v. Marshall*, No. 77-2023 (D.D.C. Nov. 28, 1977). See Memo from NIMLO President Conard Mattox, Jr., April 25, 1977. U.S. Department of Labor's Solicitor General, William J. Kilberg, takes the position that such law is constitutional notwithstanding *National League of Cities*, see Staff Data H.R. 10210, note 65 *supra*, at 111, whereas Karen J. Lewis, legislative attorney at the Library of Congress, states that the question of constitutionality is an open one, Staff Data H.R. 10210, note 65 *supra*, at 118. The outcome of this case may well turn on the degree to which Congress attempts to make the states absorb the financial costs of the program, and how much costs are involved. That is, since the program is funded by the federal tax to which state and local governments are not subject, added coverage of public employees under the new amendments will likely increase the costs of administration which, if significant, could arguably intrude into a state's sovereignty within the meaning of the *National League of Cities* case. Should this problem prove insurmountable, federal bargaining legislation could of course avoid this dilemma by a properly drafted law as discussed subsequently. On Dec. 29, 1977, the district court rejected the request for a preliminary injunction stating that the likelihood of plaintiffs succeeding on the merits is minimal and that *National League of Cities v. Usery* is distinguishable in that FLSA regulations were mandatory whereas unemployment compensation regulations are optional. BNA DLR No. 2, D-1, Jan. 4, 1978.

206. For recent support of this proposition, see *City of Macon v. Marshall*, 96 L.R.R.M. 2797 (M.D. Ga. Oct. 28, 1977) which held that federal collective bargaining requirements under the federal grant program of the Urban Mass Transportation Act do not directly displace essential state choices guarded by the tenth amendment under commerce power analysis nor compel state participation in the program. The effect of the federal regulation, in the court's view, was to induce but not force compliance with the federal requirements, thus not coming within the rationale of *National League of Cities v. Usery*. See also *Dupler v. City of Portland*, 421 F. Supp. 1314 (D. Me. 1976), where the court upheld the Federal Food Stamp Act, authorized under the spending power, over claims that it interfered with tenth amendment rights. Of course, the type of program to which the condition is attached is a policy question of extreme importance as well as a legal issue. For example, if a bargaining condition could and would be attached to the general revenue sharing law, a state's refusal to accept the federal monies could have adverse effects on poor and minority groups. See Sklar, *Impact of Revenue Sharing on Minorities and the Poor*, 10 HARV. C.R.-C.L.L. REV. 93 (1975).

C. Federal Regulation Under the Fourteenth Amendment

Historically, section 5 of the fourteenth amendment authorizing Congress to enforce by appropriate legislation the provisions of the amendment has been interpreted as a plenary power.²⁰⁷ In 1976, the Supreme Court in *Fitzpatrick v. Bitzer*²⁰⁸ reaffirmed that principle in upholding the application of amendments of the Equal Employment Opportunity Act²⁰⁹ to certain state and local employees, finding that the amendments were explicitly based on section 5 of the fourteenth amendment.²¹⁰ The Court, while upholding the federal regulation, noted that respondents had not contended that the substantive provisions of title VII²¹¹ were not a proper exercise of authority.²¹² The Court rejected the argument that the eleventh amendment shielded a state from federal regulation permitting attorney fees against the state. Instead, the Court broadly defined the federal authority as a permissible interference with state sovereignty: "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."²¹³ The Court had earlier in *National League of Cities* reserved judgment on this issue.²¹⁴ Subsequent federal court rulings have restricted the *National League of Cities* case and as discussed earlier,²¹⁵ in upholding the Equal Pay Act,²¹⁶ have noted that section 5 of the fourteenth amendment provides ample, independent constitutional authority for such federal regulation of the states without unduly impairing states' sovereignty.²¹⁷

207. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); Note, *The Civil Rights Act of 1964—Source and Scope of Congressional Power*, 60 Nw. U.L. Rev. 574 (1965).

208. 427 U.S. 445 (1976).

209. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (Supp. V 1975).

210. 427 U.S. at 453 n.9.

211. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

212. 427 U.S. at 456 n.11.

213. *Id.* at 456.

214. "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976).

215. See note 161 and accompanying text *supra*.

216. Equal Pay Act of 1963, 29 U.S.C. § 206 (1970).

217. See, e.g., *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1977). The

Whether a federal collective bargaining law would be authorized on this constitutional basis depends on whether Congress could justify such a law as an enforcement of the equal protection constraints of the fourteenth amendment by "appropriate legislation."²¹⁸ Those seeking to bring about federal bargaining legislation on this basis argue that for the federal government to establish a scheme of private sector bargaining under the NLRA and yet not to afford it to employees in the public sector would be a denial of equal protection; to avoid this, appropriate legislation is necessary.²¹⁹ Since there is no fundamental right involved,²²⁰ the traditional equal protection assessment would consider whether the legislative classification by some states, providing coverage of private employees but excluding public employees, was arbitrary or bore a rational relationship to a legitimate governmental interest.²²¹

There is ample authority for concluding that the traditional distinction between private and public employment is justified, and that there is a rational basis for this disparate treatment to preclude finding a violation of equal protection.²²² Lower courts have also permitted a state to choose between different categories of public employees, according bargaining rights to some but not to others without running afoul of the fourteenth amendment.²²³ In sum, it is predictable that a *complainant* alleging violation of

court found authority for the federal regulation even though the legislative history of the act did not explicitly rely on the fourteenth amendment. *Id.* at 155. See also text accompanying note 170 *supra*.

218. In defining "appropriate legislation" the Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), noted that legislation may be constitutional under the fourteenth amendment though it is "constitutionally impermissible in other contexts." *Id.* at 456.

219. For a discussion of this argument, see Brown, note 4 *supra*, at 690-92. It should be noted that concepts of equal protection developed under the fourteenth amendment, making the fifth amendment of the Constitution applicable to state governments, are likewise applicable to the federal government through the due process clause in the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). The argument as stated, however, should fail under fourteenth amendment analysis, since there is no state action as required by the amendment.

220. See, e.g., *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969).

221. See generally Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071 (1974).

222. E.g., *United Fed'n of Postal Clerks v. Blount*, 404 U.S. 802, *aff'g* 325 F. Supp. 879 (D.D.C. 1971).

223. See, e.g., *Beauboeuf v. Delgado College*, 303 F. Supp. 861 (E.D. La. 1969), *aff'd in part*, 428 F.2d 471 (5th Cir. 1970); *Minneapolis Fed'n of Teachers Local 59 v. Obermeyer*, 275 Minn. 347, 147 N.W.2d 358 (1966).

equal protection would most likely lose, but whether a congressional assessment that disparate treatment existed between private and public employees in their bargaining rights justifies appropriate legislation may well be another matter. The fourteenth amendment in authorizing corrective legislation by Congress²²⁴ permits some degree of congressional discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.²²⁵ Therefore, there exists an argument, albeit weak, that a state is violating the equal protection clause by creating state legislative classifications permitting collective bargaining by some private employees (not covered by the NLRA) while providing lesser rights to its public employees or no bargaining rights or banning all rights to collectively bargain.²²⁶

Thus, the prospects of finding permissible constitutional bases for federal regulation of state and local labor relations, in view of the above discussion of congressional powers under the commerce clause, the spending clause, and the fourteenth amendment, suggest that appropriately drawn bargaining legislation might well withstand judicial scrutiny. Specific federal bargaining proposals and their constitutionality are discussed below.

224. The Supreme Court in the *Civil Rights Cases* has held that the "legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," to overcome those state laws forbidden by § 1 of the fourteenth amendment. 109 U.S. 3, 13-14 (1883).

225. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where the Court rejected a state argument that an exercise of congressional power under § 5 "can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." *Id.* at 648. The Court added that the legislation would be upheld if the Court could perceive the basis upon which Congress might predicate a judgment. *Id.* at 653-56. For the argument that Congress must exercise its discretion to "reasonable perceptions," see *Oregon v. Mitchell*, 400 U.S. 112 (1970). For further discussion of Congress' power to expand judicial interpretations of state action, see Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). An interesting illustration, somewhat analogous to this analysis, of how a court may even seek out an apparently unconceived legislative basis in upholding a law is found in a recent Third Circuit opinion upholding the Equal Pay Act under the fourteenth amendment even though the legislative history showed that Congress had really used the commerce clause power. *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976); *Brown v. County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977); *Usery v. Edward J. Meyer Memorial Hosp.*, 428 F. Supp. 1368 (W.D.N.Y. 1977).

226. For collection of state labor laws that fit the above categories, see CCH, *State Labor Laws* p. 50,079. See, e.g., MASS. GEN. LAWS ANN. ch. 150A, §§ 1-12 (West 1971); MICH. COMP. LAWS ANN. §§ 423.1-.216 (1967); PA. STAT. ANN. tit. 43, § 211.3 (Purdon 1964).

IV. FEDERAL CONTROLS: A PROPOSAL FOR CONSTITUTIONALLY SOUND FEDERAL PROCEDURES FOR STATE AND LOCAL GOVERNMENT COLLECTIVE BARGAINING

The threshold question facing Congress in any future deliberations on the propriety of federal bargaining legislation is whether there is constitutional authority for such federal control. Leaving the wisdom of such legislation to Congress,²²⁷ several proposals have been suggested since *National League of Cities* that most likely would pass constitutional scrutiny based on judicial precedent to date.

A. Current Proposals

1. *Amending NLRA or Creating NPERA.* — Two bills with far reaching implications have been before congressional committees in recent years. The first would amend the NLRA to include state and local employees²²⁸ and the second, the National Public Employment Relations Act [hereinafter referred to as NPERA],²²⁹ would establish a separate national public labor relations program. Each bill would permit strikes by public employees, union security provisions, and the possibility of a very wide range of bargainable subjects.²³⁰ Associated with the scope of bargaining issue is the uncertainty of its limitations²³¹ and what

227. For treatment of conceptual and legal difficulties relating to the propriety of federal legislation, see Brown, note 4 *supra*, at 681-90.

228. H.R. 9730, 93d Cong., 1st Sess. (1973); S. 3294, 93d Cong., 2d Sess. (1974). For detailed discussion, see McCann & Smiley, note 5 *supra*.

229. H.R. 1987, 95th Cong., 1st Sess. (1977), formerly H.R. 8677, 93d Cong., 1st Sess. (1973). H.R. 1987 differs from its predecessor, H.R. 8677, in that it does not contain a mandatory agency shop provision and the parties are permitted to submit any and all unresolved issues to final and binding arbitration. *Id.* See [1977] GOV'T EMPL. REL. REP. (BNA) RF-138 at 51:181; S. 3295, 93d Cong., 2d Sess. (1974). This bill is discussed in Brown, note 4 *supra*, at 712-16. See also Baird, *National Legislation for Public Employees: "End Run on the Wagner Act?"*, 61 ILL. B.J. 410 (1973).

230. The broad language of the NLRA which requires good faith bargaining over "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d) (1970), has been liberally interpreted. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); Note, *The Scope of Collective Bargaining*, 74 YALE L.J. 1472 (1965); Note, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918 (1974).

231. In the public sector, a similar expansion of bargainable subjects has occurred. For example, a decision interpreting New York's bargaining statute expanded the scope by establishing all items as mandatory subjects "except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment." Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23

effect bargained-for contractual provisions would have on potentially conflicting statutory provisions such as tenure, merit system, or benefit statutes.²³² Whether the federal control would preempt inconsistent state legislation raises a corollary dilemma.²³³

The uncertain effect that two of these items in particular—strikes and the permissible scope of bargaining, including questions of preemption—might have on a state in conducting its affairs raises a serious question as to whether mandatory federal regulation expressly providing for such is an improper invasion of a state's sovereignty within the meaning of *National League of Cities*.²³⁴ Though a federal bill as described above might interfere less with those states already having a similar comprehensive law, those states are relatively few; and in a state with little or no existing statutory collective bargaining law, it is apparent that significant changes would occur in a state's structuring of its employment relationship. Assuming that public employees would utilize the federal rights, state compliance with the bargaining requirement almost certainly would result in additional administrative costs, reporting obligations, potential modifications of existing working conditions and benefit plans,²³⁵ and possible bargaining on subjects previously within the employers' prerogatives.

(1972). See also Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973).

232. Of course, such problems are not insurmountable and have been dealt with in state statutes by management rights clauses reserving subject areas to the employer and specific legislation giving precedence to statutory law. See generally Brown, note 4 *supra*, at 701-02.

233. This subject is discussed in Chanin & Snyder, note 116 *supra*, in which the authors categorize the problem areas of preemption into three areas: (1) state statutes in conflict with the federal statutes, (2) state collective bargaining statutes, and (3) state statutes establishing terms and conditions of public employment. They conclude generally that the supremacy clause of the Constitution will permit the federal control to predominate but that state prerogatives could be reserved by appropriate regulations. *Id.* at 236. For speculation on the "dire consequences" to be caused by a federal bargaining law, see Lieberman, note 116 *supra*.

234. For an argument that even a state law providing for mandatory bargaining improperly intrudes into state sovereignty, albeit on different legal grounds, see Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

235. There is some debate as to whether unionized employees may exact more benefits from a public employer than nonunionized employees. See, e.g., D. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* 60 (1972); Hall & Carroll, *The Effect of Teachers' Organizations on Salaries and Class Size*, 26 INDUS. & LAB. REL. REV. 834 (1973); Ashenfelter, *The Effect of Unionization on Wages in the Public Sector: The Case of Firefighters*, 24 INDUS. & LAB. REL. REV. 191 (1971).

Applying the guidelines of *National League of Cities v. Usery*,²³⁰ it is apparent that labor relations of a state is an essential function of its operation since without a properly maintained work force there could not be an effective operation.²³⁷ That point, however, is not without contention. It may be argued that the Court's decision was aimed at prohibiting the directing of certain operations by the state (hours, schedules, etc.), rather than merely superimposing a set of federal procedures to be followed by the states in dealing with their employees to reach those decisions.

In that respect, the argument continues, a good faith bargaining obligation is more akin to the federal obligation of equal pay for equal work, a procedural requirement not displacing ultimate employer choices.²³⁸ That issue is not easily resolved at this point. A preliminary assessment requires the author to predict, however, that such potentially far-reaching laws would call for the Supreme Court's judgment on the very serious question of the states' abilities to continue operation (if employees strike) and the states' abilities to determine the employment benefits through a legislative process. This could compel a conclusion, perhaps by bootstrap logic, that a federal bargaining law as described above would be an essential function of the state.

The touchstone issue more likely is whether such a law "directly displace[s] the States' freedom to structure integral operations in areas of traditional government functions."²³⁹ The same factors mentioned above—strikes and potential preemption of state laws by the federal law or through bargaining under it—again must be dealt with under this second criterion from *National League of Cities*. The increased incidence of public employee strikes in past years has been noticeable. For example, in 1973 there was a loss of nearly three million man-days of work caused by nearly 400 work stoppages by public employees.²⁴⁰

236. 426 U.S. 833 (1976). The Court explicitly named the types of operations typically an integral part of the state's activities: "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851.

237. *Id.*

238. See *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1977), where *National League of Cities v. Usery*, 426 U.S. 833 (1976), was distinguished by the court partially on that basis in upholding the Equal Pay Act, an amendment to the FLSA. See also *Usery v. Board of Educ.*, 421 F. Supp. 718 (D. Utah 1976).

239. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

240. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, Report No. 434, WORK STOPPAGES IN GOVERNMENT 3 (1974). This was up from 455,000 lost work days and 142 work stoppages in 1966. *Id.*

Though the total percentage of time lost is relatively small, especially when compared with time lost in the private sector,²⁴¹ it must be remembered that strikes are outlawed in most states.²⁴² Therefore, the potential for directly disrupting and perhaps displacing state choices by the economic coercion of a strike looms as a very real possibility. This possibility, combined with the probable preemption of state laws and statutory employee benefit schemes, would normally lead to the likely conclusion that a federal statute would directly displace state choices and that the federal regulation passed under the commerce clause would be prohibited by the tenth amendment limitation.²⁴³ One significant factor, however, remains unstated: under neither bill is there a mandatory obligation to agree to anything, only to meet and bargain in good faith.²⁴⁴ Thus, there need not be any displacement of state choices or employment structures nor relinquishment of government activities unless the state voluntarily chooses to permit it. Nevertheless, though that factor may ameliorate the scope of bargaining and the preemption issue as the decisive consideration, the right of public employees to strike under these laws most likely would cause them to be found unconstitutional in exceeding the proper boundaries of the commerce clause.

In assessing the above criteria, it must be remembered that the Court in *National League of Cities* employed a test balancing the federal and state interests. Therefore, in addition to the above considerations, the Court in evaluating those interests undoubtedly would consider that fewer than twenty states have comprehensive bargaining legislation for public employees, that bargaining by public employees is statutorily prohibited in some states, and that there is considerable current labor unrest including strikes by public employees. The Court may take cognizance that it was these factors existing in the private sector some years ago which prompted the enactment of the NLRA. That Act begins by

241. In 1971, for example, time lost for strikes by government workers (including federal employees) was .03% of total work time, compared with .32% for the private, non-farm economy, cited in Brown, note 4 *supra*, at 704 n.96.

242. Many of the strikes occur in states which permit lawful strikes by public employees, though on a limited basis, e.g., Pennsylvania; also there is a high incidence of strikes in states without a bargaining statute, e.g., Ohio. See also Shaw & Clark, Jr., *Public Sector Strikes: An Empirical Analysis*, 2 J. LAW & EDUC. 217 (1973); Lichtenberg, *Some Effect of Strikes and Sanctions — Legal and Practical*, 2 J. LAW & EDUC. 235 (1973).

243. U.S. CONST. amend. X.

244. For example, there is no mandate on the NLRA that concessions must be given or an agreement reached. 29 U.S.C. § 158(d) (1970).

stating: "The denial by some employers of the right to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce."²⁴⁵

Additionally, when considering that in 1971 the interstate purchases made by state and local governments amounted to over 135 billion dollars or over ninety percent of the total state and local government expenditures and accounted for over ten percent of the gross national product and affected over thirteen million employees,²⁴⁶ the consequence of the states' failure to regulate their labor relations adequately might well justify a conclusion by the Court that there is an *overriding federal interest* to act. Though such a prediction is tenuous at best, one can conclude at a minimum that such a holding is not necessarily precluded under the commerce clause as interpreted by *National League of Cities*.

The constitutionality of the two federal bargaining laws discussed above might be based on article I, section 8, clause 1 of the Constitution, which permits the federal government to condition funds it disburses to a state recipient on that state's agreement to comply with federal regulations.²⁴⁷ Since that is not a current proposal, it is only necessary to note that such federal conditions would have to be reasonably related to a federal program that the federal government was funding and voluntarily agreed to by the state: both requirements are distinctly possible while staying within the constitutional guidelines described in earlier sections.²⁴⁸

With respect to basing the federal laws described above on the constitutional authority of section 5 of the fourteenth amendment, though this power seems plenary after *Fitzpatrick v. Bitzer*,²⁴⁹ little can be added to the earlier discussion, which noted that Congress would have to justify the law as a means of preclud-

245. National Labor Relations Act, 29 U.S.C. § 151 (1970), *upheld in* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

246. See text accompanying notes 92 & 93 *supra*.

247. U.S. CONST. art. 1, § 8, cl. 1 is set out at note 25 *supra*.

248. A holding favoring constitutionality is encouraged by Justice Rehnquist's majority opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Justice Rehnquist held that a state's sovereignty is not improperly infringed upon when a state is compelled by federal statute to pay attorney fees from its treasury to successful plaintiffs where the state has not treated its employee in accordance with law. *Id.*

249. *Id.*

ing invidious discrimination or a way to enforce the equal protection requirements of the fourteenth amendment.²⁵⁰ There is no current proposal suggesting this as a constitutional basis.

2. *NEA Proposal*. — Another current proposal for federal bargaining legislation, though still in the formative stages, is being put forth by the National Education Association [hereinafter referred to as NEA].²⁵¹ In drafting the statute, NEA general counsel, Robert Chanin, will attempt to modify earlier NEA proposals to meet the guidelines of *National League of Cities* in several ways. First, rather than abandoning the right to strike, he suggests retaining it and adding a proviso expressly authorizing a state to prohibit or limit the right by statute.²⁵² This would permit a continuation of the right to strike in states where it is now authorized.²⁵³

A second provision of the NEA proposal deals with procedures for resolving bargaining impasses. Rather than having binding interest arbitration where an arbitrator would be empowered to impose upon the states "specified expenditures, personnel policies, operating procedures, etc.," the NEA will propose "nonbinding recommendations for the terminal step" with a proviso "expressly authorizing a state to enact legislation making the recommendations binding if it chose to do so."²⁵⁴ A third provision, formerly granting federal preemptive powers over state statutes, would instead take a nonpreemptive approach permitting the states to determine substantive terms and conditions of employment including retirement, tenure, etc., by statute in the future.²⁵⁵

The chances of such a proposal meeting the constitutional

250. See text accompanying notes 207-23 *supra*.

251. See [1977] Gov't EMPL. REL. REP. (BNA) 693:12-13.

252. Chanin notes that "[a]lthough this approach places an affirmative burden upon the states to take legislative action in order to avoid federal intrusion, we do not believe that this is the type of forced relinquishment of decision-making that the Court found unacceptable in *National League of Cities*." [1977] Gov't EMPL. REL. REP. (BNA) 693:13.

253. *Id.*

254. Reading this provision with the first, Chanin notes that several bargaining structures could result, including "nonbinding recommendations with the right to strike unless the teacher organization waives that right in order to secure a binding decision. At worst, they could have what is available under most of the current public sector collective bargaining statutes—that is, nonbinding recommendations with a strike prohibition." *Id.*

255. Chanin points out that this result does not cause NEA any real difficulty "since most of the statutes in question are protective in nature and have the support of NEA's state affiliates." *Id.* at 13.

guidelines of *National League of Cities*, as discussed above, appear good. It minimizes the disruptive aspects of the earlier federal legislation and would not appear to impair the sovereignty of a state, in the sense that a state need not agree to any employee demands.²⁵⁶ Using the same approach and rationale, it would also appear possible to base such a law on the spending power of the Constitution.

3. *Other Proposals.* — A third set of proposals for bargaining legislation comes from two public employer groups, the American Association of School Administrators [hereinafter referred to as AASA] and the National Public Employer Labor Relations Association [hereinafter referred to as NPELRA]. Both propose model bills for *state* legislation, though each could also be the basis of a federal law.

The NPELRA proposal is still in its formative stages; and, although it has many enlightened and desirable features, it appears doomed to the same consequence as the amendment to the NLRA discussed above because it permits a limited right to strike.²⁵⁷ The proposal by AASA is intended as a model public employee collective bargaining law for states, though the AASA disclaims it is urging support of bargaining legislation.²⁵⁸ Rather, it suggests that it is helping "protect the public interest" where school systems have been confronted with the bargaining issue.²⁵⁹ Its coverage extends to local public employers.²⁶⁰ It provides for exclusive recognition, representation elections, unfair labor practices, a scope of bargaining excluding statutory matters, fair representation by the union,²⁶¹ and it expressly prohibits strikes.²⁶² In view of its treatment of strikes, this proposed bill could provide a working model for federal collective bargaining legislation and satisfy the constitutional guidelines of *National League of Cities*.

256. A countervailing argument, of course, is that the strike potential is still a very real possibility in that situation; as was illustrated earlier, notwithstanding strike prohibitions in the public sector, strikes persist and could therefore bring the operations of state governments to a complete standstill. This argument then leads to the Supreme Court's balancing approach in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The question is which weighs heavier—the possibility of a small percentage of strikes in view of the states injunctive power to compel the strikers return or a perceived national interest in providing bargaining rights for public employees.

257. [1976] Gov't EMPL. REL. REP. (BNA) 673: B-9 to -12.

258. [1977] Gov't EMPL. REL. REP. (BNA) RF-135 at 51:451-69.

259. *Id.* at 451.

260. *Id.* at 453.

261. *Id.* at 463.

262. *Id.* at 465.

It would perhaps be ironic, but not without precedent, for an employer-initiated bargaining proposal to be passed into law.²⁶³

B. Possible Legislation Based on Federal Minimum Standards

After *National League of Cities*, what is generally required for constitutional legislative authority is a carefully and artfully drawn federal regulation, tailored in such a way as both to preserve and to remain sensitive to the prerogatives of the states, while at the same time creating an appropriate system for collective bargaining which fulfills a congressionally perceived national need. In meeting that perhaps quixotic charge, the following passage from the *National League of Cities* case, discussing the limits of federal legislation under the commerce clause as constrained by the tenth amendment, provides guidance: "Congress may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made."²⁶⁴

An initial inquiry is whether that language is to be read as prohibiting congressional imposition of a bargaining process which permits the states to retain ultimate control over the substantive decisions involved in rendering traditional government services. Alternatively, this language may be interpreted as merely saying that Congress may not dictate to the states its substantive decisions. In other words, did the Court intend to prohibit only federally substituted judgments on a state's essential substantive decisions affecting its integral operations? Or, did it also intend to include the internal processes by which personnel matters are discussed and negotiated?

The difficulty of accepting the latter, broader interpretation is underscored in Justice Stevens' dissent where he notes that state sovereignty is certainly penetrable by the federal government in requiring "the State to act impartially when it hires or fires [a state employee], to withhold taxes from his paycheck,

263. An analogous situation arose in the late 1960's when Cornell University officials filed a petition with the NLRB asking it to assert jurisdiction over private college employers. The request apparently was made because the New York State bargaining law at that time provided what the employer felt were insufficient unfair labor practice provisions applicable to labor unions, whereas the federal law was broader. See Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LAB. L.J. 778, 800 (1968).

264. 426 U.S. 833, 855 (1976). Obviously inherent in any federal regulation requiring procedural bargaining obligations is displacement of state choices, and so perhaps the best test after all is a balancing test.

[and] to observe safety regulations when he is performing his job."²⁶⁵

Different approaches for federal regulation are by now apparent and can be categorized as based on the (1) commerce clause; (2) spending power conditioning federal grants on compliance; (3) federal/state cooperative programs under the spending power conditioning federal grants on a state passing appropriate legislation that meets federal standards; and (4) fourteenth amendment. Within this context, a proposal for federal bargaining legislation is made below, based on minimum federal standards. The proposal can have as its constitutional base at least any of the first three approaches and possibly the fourth without, in the author's judgment, unduly infringing on state sovereignty as presented in *National League of Cities*.

In drafting federal bargaining legislation for state and local employees, it would be unfortunate and shortsighted to assume there is no difference between the public and private sectors and to place public employees automatically under the NLRA, even if constitutionally permissible. Rather, there are so many differences between the states and within a particular state as how best to approach labor relations, that a uniform comprehensive federal regulation might well stunt legislative innovations now taking place in the states, albeit on a somewhat piecemeal basis. On the other hand, without federal prompting there could continue to be "underregulation and non-regulation" of labor relations in many states which now deny minimum bargaining rights to a large number of public employees.²⁶⁶ Therefore, in establishing a system of public sector labor relations, certain broad procedural minimum standards of essential bargaining rights could be provided and protected by federal guidelines while leaving the details of implementation and substantive decision-making to the states. This would meet the essential needs of public employees and at the same time accommodate some of the legitimate state interests of sovereignty while reserving control of labor relations to state officials familiar with the intricacies of state fiscal, legislative, and political structures. Under this system, any state with

265. *Id.* at 880 (Stevens, J., dissenting). Arguably, of course, some of these penetrations may be based on constitutional authority under section five of the fourteenth amendment or the U.S. CONST., art. I, § 8, cl. 1, spending power.

266. See Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. TOL. L. REV. 681, 717 (1974).

a law in substantial conformity would be given authority to administer that law under the general supervision of a federal agency, which would monitor compliance. Any state failing to act or acting in nonconformity would be subject to the provisions of the federal guidelines administered by a federal coordinating agency. By providing the states broad discretion to fashion rules of implementation and to determine substantive areas of bargaining, such as scope of bargaining and impasse resolution, this approach could minimize the inherent tension resulting from the federal government's regulation of the states' labor policies.

The broad procedural minimum standards promulgated by the federal government should provide the rights essential to meaningful bargaining and a basic legal framework within which the bargaining may take place. Controversial nonessential items and those obviously touching on attributes of state sovereignty such as the limited right to strike, interest arbitration, bargaining by supervisors, union security provisions, and bargainable subjects covered by state law could be omitted by the federal guidelines and left to the discretion of the individual state. The essential minimum standards to be adopted by the states would certainly include the following provisions:

(1) Organizational and collective bargaining rights for non-supervisory, nonelected public employees with any resulting agreements being enforceable and subject to grievance arbitration;

(2) an agency, adequately funded and provided with effective remedies, to administer the state labor relations program, to resolve representation issues and unfair labor practices, and to aid in the resolution of bargaining impasses by providing for mediation and factfinding services;

(3) secret ballot elections, exclusive recognition, and the designation by the agency of appropriate bargaining units based on the common criteria of community of interest and minimum fragmentation;

(4) procedures calling for good-faith bargaining, though without obligation to agree to any terms, over "wages, hours, and other terms and conditions of employment" on a *nonpreemptive basis*, with the precise scope of subjects left to the states except that any resulting state regulation could not significantly undercut the rights granted by this section, and with the states being able to establish management rights provisions within the same limitation;

(5) procedural limitations on the conduct of the bargaining, which would prohibit unfair practices by both public employers and public employee organizations and would include duties of fair representation by the latter; and

(6) settlement mechanisms providing for methods of persuasion by the agency such as mediation and factfinding upon the occurrence of a bargaining impasse dispute, but leaving to the state the resolution of whether to use binding interest arbitration, a limited right to strike, or some other fair and accommodating method including strike prohibitions with the right of the employer to act unilaterally upon reaching a good-faith bargaining impasse.

A further suggestion to encourage continuing vitality in the standards would be to require the federal coordinating agency to review automatically and periodically the federal guidelines and, if need be, to facilitate "consensus refinement" of the minimum procedural standards in light of state experience and experimentation. Also, depending on the constitutional approach used, as discussed below, the federal agency could supply technical assistance and provide administrative grants to cover the financial obligations of implementing and administering the procedural standards.

In sum, such minimum standards established in a framework of procedural requirements imposed on the states by federal regulation, when combined with the right of the states to opt out under substantially conforming state legislation, would provide a fair and feasible accommodation of competing federal and state interests with minimum antagonism to the sovereign prerogatives of each.

The minimum standards for labor regulations may be housed in a number of regulatory vehicles. As presented above, the standards could be promulgated by direct federal legislation with congressional authority coming from the commerce clause, article I, section 8, clause 3, or tied to the spending power of article I, section 8, clause 1 in the form of conditions attached to federal contract or grant requirements and/or as part of a federal/state cooperative program, or lastly as appropriate legislation to implement the fourteenth amendment. A brief review of the constitutionality of each approach using these minimum standards as the basis for federal regulation is discussed below.

The most direct and comprehensive approach would be a federal statute based on the commerce power. The limitation on

that power after *National League of Cities* resides in the tenth amendment, which, by interpretation, holds that federal regulation may not directly displace state choices over essential and integral state operations.²⁶⁷ The procedural nature of minimum standards obligations, when combined with the fact that no substantive decisions are mandated under the regulation, strongly suggests a conclusion that the ability of a state to function within a federal system would not be impaired and would not be therefore an unconstitutional invasion of state sovereignty.

The constitutionality of the federal regulation is further supported by use of the balancing test espoused by Justice Blackmun, as representative of the majority opinion in *National League of Cities*.²⁶⁸ Under this test, the national interest in providing uniformity and certainty to collective bargaining arrangements for public employees and minimizing labor unrest and strife arguably would outweigh state interests on the issues embodied in the tenth amendment. Certainly such a conclusion is consistent with the rationale used in *National League of Cities*. Although such a holding cannot be a certainty in view of the precedent-shattering decision in that case, clearly a contrary holding would invite support for Justice Brennan's dissenting observation that it would appear to be "a transparent cover for invalidating a congressional judgment with which they disagree."²⁶⁹

A second approach for implementing the federal minimum standards is to condition certain federal funds on the adoption of such regulations, as authorized under the spending power of the Constitution. In some states, for example, those without enabling legislation for bargaining by public employees, this will necessitate state statutory authorization by those states choosing to continue receiving the federal funds. A potential problem exists in that such an approach may not be comprehensive; for example, if the labor standards were tied to only federal procurement contracts or grants, it is possible that many public employees would not be covered.²⁷⁰ However, certain existing federal programs sug-

267. See notes 121-46 and accompanying text *supra*.

268. 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

269. *Id.* at 867 (Brennan, J., dissenting).

270. However, by analogy to affirmative action requirements, it may be possible to affect noncontract employees at a particular state or local agency receiving the funds by requiring the government recipient to act affirmatively in its contractual commitments with all employees. See note 33 *supra*.

gest that a comprehensive system could be constructed either on a piecemeal basis tied to categorical or block grants by occupation, for example police under LEAA funding and highway employees under highway fund monies, as illustrated by the present collective bargaining program covering transit workers under the law regulating public urban mass transit systems.²⁷¹ Or, such a system could be accomplished under a more ambitious program involving block grants such as revenue sharing, which reaches most state and local governments and already contains some labor standards provisions.²⁷²

A related approach involves creating a new statutory scheme modeled after the federal/state unemployment compensation program, recently made applicable to state and local governments.²⁷³ Such an approach must first devise and then provide an appropriate inducement to the states so they will choose to pass state legislation under the federal minimum standards guidelines. Perhaps a new and separate source of state generated revenues could be tapped, which would provide the funding source for administering the program, or alternatively bonus federal monies, under related programs, *e.g.*, under general revenue sharing, could be made available to those states adopting the minimum standards guidelines. Or a more negative approach could be used, and states could be penalized a certain percentage of federal monies under related programs for nonadoption of the guidelines.²⁷⁴

Under any of the above-suggested programs constitutionally based on the spending power, the relevant legal standard in upholding conditions, such as the minimum standards provision, has been that they be reasonably related to a legitimate national end and be voluntarily agreed to by the states.²⁷⁵ Though the Supreme Court in *National League of Cities*²⁷⁶ specifically re-

271. See text accompanying notes 56-62 *supra*. An interesting point for argument might be whether such mass transit services are essential functions of a state. See text accompanying note 136 *supra*.

272. See text accompanying notes 45-51 *supra*.

273. See text accompanying notes 65-74 *supra*.

274. See, *e.g.*, where federal funds were impounded as a penalty for noncompliance with the Hatch Act and Highway Beautification Act respectively, *Ohio v. United States Civil Serv. Comm'n*, 65 F. Supp. 776 (S.D. Ohio 1946), and *Vermont v. Brinegar*, 379 F. Supp. 606 (D. Vt. 1974). More recently, \$ 76 million in federal monies have been withheld under the general revenue sharing program for noncompliance with anti-discrimination provisions, *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

275. See text accompanying notes 175-206 *supra*.

276. 426 U.S. 833, 852 n.17 (1976).

served judgment on the constitutional limits that may be imposed by the tenth amendment on the spending power, the same nonintrusive features of federal minimum standards guidelines discussed above should be sufficient in this context to permit the minimum standards condition to withstand judicial scrutiny and to be held an appropriate exercise of constitutional authority.

The final approach for imposing federal regulations is to base the minimum standards on section 5 of the fourteenth amendment. As discussed earlier, there could be a problem in establishing a sufficient justification under the equal protection requirement.²⁷⁷ If such a justification could be found, perhaps in the disparity of bargaining rights between public and private employees under state law, then the constitutionality of federal minimum standards is promising in view of the language used in *Fitzpatrick v. Bitzer*,²⁷⁸ in which such power is called plenary and is not limited by state sovereignty. Also supportive of this argument are the lower court holdings subsequent to *National League of Cities*, upholding the Equal Pay and Age Discrimination in Employment Acts by narrowly construing that case and at the same time finding an appropriate constitutional basis under the fourteenth amendment.²⁷⁹

In summary, it would appear that unless the Supreme Court would risk bringing to a halt many existing programs of the federal government, which directly and indirectly regulate the states, federal regulation of state and local government collective bargaining is constitutionally possible when housed in an appropriate regulatory scheme. The regulatory scheme that best keeps within the dictates of recent Supreme Court decisions provides federally mandated procedural guidelines which establish minimum standards for the bargaining relationship between the public employer and its employees. A desirable part of such a program, which would also assist in its remaining constitutional, would be for the federal regulations to provide funds to cover the administrative costs of the state agency administering its law and, additionally, to permit the states to opt out if they adopt legislation in substantial conformity with the federal guidelines.

Though many combinations of federal regulation, both direct and indirect, are possible, the program most likely to withstand

277. See text accompanying notes 75-89 *supra*.

278. 427 U.S. 445, 456 (1976).

279. See text accompanying notes 207-226 *supra*.

judicial scrutiny would be one which is based on the spending power and which conditions the minimum procedural labor standards on a specific grant or a general grant such as revenue sharing. If a more direct method of regulation is sought, the minimum standards could be embodied in a statute based additionally on the commerce power and fourteenth amendment, thus leaving as much leeway as possible for favorable judicial interpretation of the constitutional basis.

It is hoped, though not expected, that the exploration and analysis in this article of the implications of the *National League of Cities* case and the constitutionality of federal laws regulating the states' labor relations will remove some of the recent mystique which has inhibited discussion of the propriety of federal collective bargaining legislation, and that opponents and proponents of such legislation can now leave the courts and return to Congress where the debate of such social and economic legislation is more appropriate.